89

Supreme Court, U.S.
FILED
(1) 071259 FEB 19 2008
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Rachel Haas, Carol Haas, and Richard Haas
Petitioners,

v.

Quest Recovery Services, Inc. and State of Ohio
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

'CORRECTED' PETITION FOR WRIT OF CERTIORARI

W. Craig Bashein, Esq.
BASHEIN & BASHEIN CO., L.P.A.
3500 Terminal Tower
50 Public Square
Cleveland, Ohio 44113
(216) 771-3239

Paul W. Flowers, Esq.*
PAUL W. FLOWERS CO., L.P.A.
3500 Terminal Tower
50 Public Square
Cleveland, Ohio 44113
(216) 344-9393

Attorneys for Petitioners

*Counsel of Record

QUESTION PRESENTED

1. Should the Sixth Circuit have followed the holdings of the First, Ninth, and Eleventh Circuits which had recognized that Congress had abrogated Eleventh Amendment Immunity by adopting Title II of the Americans with Disabilities Act (ADA) and allowing States to be held liable for failing to comply with handicap accessibility requirements?

2. Is absolute judicial immunity applicable to sentencing orders that result in an individual suffering disparate treatment in violation of the Constitution and/or statutory law while in confinement?

3. When the U.S. Supreme Court remands a civil action to a court of appeals with instructions that the panel is "to consider the views of the United States", may the panel refuse to do so on the erroneous grounds that the plaintiff's pleadings fail to meet the minimal requirements imposed by Fed.R.Civ.P. 8(a)?

4. When a sixty (60) paragraph amended complaint is required to be prepared and submitted prior to the announcement of a U.S. Supreme Court decision which substantially modifies and clarifies the applicable principles of constitutional law, may an appellate court terminate the

proceedings on the basis that the claims for Title II ADA discrimination were not alleged with a high degree of particularity?

PARTIES TO THE PROCEEDING

Petitioners are Rachel Haas, Carol Haas, and Richard Haas. Petitioners are not corporate entities.

Respondent is the State of Ohio. Quest Recovery Services, Inc. and the City of Canton were defendants in the proceedings below but are not involved in the instant appeal.

Intervenor is the United States. Following the filing of Petitioners' first Petition for Writ of Certiorari in this Court, the United States sought to intervene "pursuant to 28 U.S.C. 2403(a), for the limited purpose of defending the constitutionality of an important federal civil rights law." *Brief of the United States as Intervenor, U.S. Sup. Ct., Case No. 06-263, p. I.*

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

ARGUMENT FOR GRANTING THE WRIT 8

I The Opinion of the Sixth Circuit Court of Appeals squarely conflicts with decisions of the First, Ninth, and Eleventh Circuit Courts of Appeal and unjustifiably subverts Congressional intent to redress all forms of governmental handicap discrimination through Title II of the Americans with Disabilities Act. 8

A. Overview 8

B. Implications of *U.S. v. Georgia*. 9

C. Petitioners' Equal Protection Claim 11

D. The Conflict Over the "Due Process Only" Standard 15

II. The Sixth Circuit's overly expansive view of absolute judicial immunity now permits governmental entities in that jurisdiction to discriminate with impunity against anyone who is subject to a judicial order. 18

III. Petitioners' First Amended Complaint alleging a claim of Title II disability discrimination satisfies the notice-pleading requirements imposed by Fed.R.Civ.P. 8(a), particularly given that the pleading was prepared without the benefit of *Georgia*, 546 U.S. 151 21

CONCLUSION 31

APPENDIX

Appendix A
Sixth Circuit Order dated November 23, 2007 denying Petition for Re-Hearing *en banc* 1a

Appendix B
Sixth Circuit Opinion on Remand filed August 21, 2007 ..... 2b

Appendix C
Sixth Circuit Court Order dated March 27, 2006 ..... 8c

Appendix D
Sixth Circuit Mandate of April 18, 2006 ..... 22d

Appendix E
District Court's Order on Motion to Dismiss dated September 20, 2004 ..... 23e

Appendix F
Complaint filed March 1, 2004 ..... 41f

Appendix G
First Amended Complaint filed June 11, 2004 ... 58g

TABLE OF AUTHORITIES

Federal Cases

Alabama v. Pugh, 438 U.S. 781, 782, 98 S.Ct. 3057, 3058,57 L.Ed.2d 1114 (1978) 10

American Inter-Fidelity Exchange v. AmericanRe-Insurance Co., 17 F.3d 1018, 1021-1022 (7th Cir. 1994) 11

Association for Disabled Americans v. Florida Intl. Univ.,405 F.3d 954 (11th Cir. 2005) 15

City of Boerne v. Flores, 521 U.S. 507, 117 S.Ct. 2157,138 L.Ed.2d 624 14

Cleburne v. Cleburne Living Cntr., 473 U.S. 432, 448,105 S.Ct. 3249, 3258, 87 L.Ed.2d 313 (1985) 12

Collins v. Nagle, 892 F.2d 489, 493 (6th Cir. 1989) ... 26

Columbia Riv. Corr. Inst. v. Phiffer, ____ U.S. ___,126 S. Ct. 1140, 163 L.Ed.2d 999 15

Columbia Riv. Corr. Inst. v. Phiffer, 541 U.S. 1059,124 S. Ct. 2386, 158 L.Ed.2d 960 (2004) 15

Constantine v. Rectors & Visitors of George MasonUniversity, 411 F.3d 474 (2005) 16

Daush v. Rykes, 52 F.3d 1425, 1427 fn. 3 (7th Cir. 1994) 11

Duvall v. County of Kitsap, 260 F.3d 1124, 1133-1135(9th Cir. 2001) 19

Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347,39 L.Ed.2d 662 (1974) 10

Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817,82 L.Ed. 1188 (1938) 22

Forrester v. White, 484 U.S. 219, 227-229, 108 S.Ct. 538,98 L.Ed.2d 555 (1988) 19

United States v. Georgia, 546 U.S. 151, 126 S.Ct. 877, 881-882, 163 L.Ed.2d 650 (2006) ..... passim

Haas v. Quest Rec. Servs., 338 F.Supp.2d 797, 803(N.D. Ohio 2004) 11

Haas v. Quest Recovery Servs., ___ U.S. ___,127 S.Ct. 1121, 166 L.Ed.2d 888 (2007) ..... passim

Hazen v. Western Union Telegraph Co., 518 F.2d 766,770 (6th Cir. 1975) 25

Helen L. v. DiDario, 46 F.3d 325, 335 (3rd Cir. 1995) 8

In re NationsMart Corp. Sec. Lit., 130 F.3d 309, 315-316(8th Cir. 1997) 25

Johnson v. City of Saline, 151 F.3d 564, 571 (6th Cir. 1998) ..... passim

Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993) 20, 21

McIntyre v. Robinson, 126 F.Supp.2d 394, 408 (D. Md. 2000) 25

Michaels Building Co. v. Ameritrust Co., 848 F.2d 674, 679 (6th Cir. 1988) 25

Mireles v. Waco, 502 U.S. 9, 112 S. Ct. 286, 116 L.Ed.2d 9 (1991) 18

Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721, 123 S.Ct. 1972, 155 L.Ed.2d 93 (2003) 14

New York State Waterways Assn. v. Diamond, 469 F.2d 419, 421 (2nd Cir. 1972) 25

Ott v. Midland-Ross Corp., 523 F.2d 1367, 1369 (6th Cir. 1975) 25

Pennsylvania Dept. of Corr. v. Yeskey, 524 U.S. 206, 118 S. Ct. 1952, 141 L.Ed.2d 215 (1998) 17

PGA Tour, Inc. v. Martin, 532 U.S. 661, 675, 121 S.Ct. 1879, 1889, 149 L.E.2d 904 (2001) 8

Phiffer v. Columbia Riv. Corr. Inst., 384 F.3d 791, 792-793 (9th Cir. 2004) 14

Pierson v. Ray, 386 U.S. 547, 87 S. Ct. 1213, 18 L.Ed.2d 288 (1967) 18

Popovich v. Cuyahoga County Court of Common Pleas, 276 F.3d 808 (6th Cir. 2002) (en banc) ..... passim

Scheurer v. Rhodes, 416 U.S. 232, 236 (1974) 26

Southern Gum Co. v. Laylin, 66 Ohio St. 578, 64 N.E. 564 (1902) 23

State v. Bob Manashian Painting, 121 Ohio Misc.2d 99, 782 N.E.2d 701, 704-705 (Cuy. C.P. 2002) 23

Stevens v. Harper, 213 F.R.D. 358, 374 (E.D. Cal. 2002) 25

Tennessee v. Lane, 541 U.S. 509, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004) 16

Thompson v. Davis, 295 F.3d 890, 895 (9th Cir. 2002) 24

Toledo v. Sanchez, 454 F.3d 24 (1st Cir. 2006) 14

Federal Statutes and Rules

28 U.S.C. § § 1254(1) 1

28 U.S.C. §1331 3

28 U.S.C. §1343 3

28 U.S.C. §2403(a) 6

28 U.S.C. §24303(a) 6

28 U.S.C. §2403(a) ..... ii, 6
42 U.S.C. §12131 to §12165 6
42 U.S.C. §12132 ..... 2, 3
42 U.S.C. §12132 19
42 U.S.C. §12181 13
42 U.S.C. §1983 ..... 4, 10, 18
Fed .R. Civ. P. 8(e) 25
Fed.R.Civ.P. 12(b)(1) 4
Fed.R.Civ.P. 12(B)(6) 3, 4
Fed.R.Civ.P. 8(a) ..... passim

OPINIONS BELOW

The Opinions of the United States Court of Appeals for the Sixth Circuit have not reported and have been included in the Appendix at Appendices B & C.

The Opinion of the District Court for the Northern District of Ohio has been published 388 F. Supp.2d 797 and is included herewith in *Appendix E, p. 20e.*

JURISDICTION

The United States Court of Appeals for the Sixth Circuit's Order denying the Petition for Re-Hearing *En Banc* was issued on November 23, 2007. *Appendix A, p. 1a.* This Petition for Writ of Certiorari is filed within ninety (90) days of the issuance of that decision. *Sup.Ct.R. 13(3).* This Court's jurisdiction is invoked pursuant to 28 U.S.C. § § 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Eleventh Amendment to the United States Constitution

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Fourteenth Amendment
to the United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

***

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Americans with Disabilities Act (Title II)
42 U.S.C. § 12132

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

STATEMENT OF THE CASE

A. Nature of the Case.

Petitioner, Rachel Haas, is a partial leg amputee who suffers from a number of other physical disabilities. She is seeking injunctive relief and damages as a result of the refusal of Respondent, State of Ohio, to comply with Title II of the Americans with Disabilities Act (ADA) with regard to state sponsored overnight drug and alcohol treatment programs. Her parents, Petitioners Carol and Richard Haas, have raised claims for loss of consortium.

B. Course of Proceedings.

Petitioners commenced this action against Defendants, Quest Recovery Services, Inc. (hereinafter "Quest") and the City of Canton (hereinafter the "City"), on March 1, 2004. *R. 1, Complaint; Appendix F at p. 37f.* The Complaint raised separate claims for Handicap Discrimination (Count I), Rehabilitation Act Violations (Count II), Civil Rights Violations (Count III), Negligence/Intentional Tort (Count IV), Infliction of Emotional Distress (Count V), and Loss of Consortium (Count VI). *Id.* It was alleged *inter alia* that Petitioner, Rachel Haas, had suffered serious injury, humiliation, and distress while attending a six day non-handicap equipped driver intervention program (DIP) in Massillon, Ohio.[1] Quest had operated the program in a building owned by

---

[1] Petitioner had been permanently crippled in an ATV/truck accident. She was convicted of driving while intoxicated in connection with the incident and ordered, as part of her sentence, to complete the six day Driver Intervention Program as an alternative to incarceration.

Respondent, State of Ohio. Participants were required to stay overnight. Both Defendants submitted Answers denying liability. No challenges were raised to federal jurisdiction under 28 U.S.C. §1331 (Federal Question) and 28 U.S.C. §1343 (Civil Rights and Elective Franchise).

On May 24, 2004, the City filed a Motion to Dismiss pursuant to Fed.R.Civ.P. 12(B)(6). *R. 14.* The municipality argued that only the State government had been involved with the operation of the DIP and the housing of the participants. Having no reason to dispute the numerous authorities cited therein, Petitioners voluntarily agreed to dismiss all claims against the City on May 27, 2004. *R. 17, Joint Notice of Partial Dismissal.*

At the same time, Petitioners submitted their Unopposed Motion for Leave to File First Amended Complaint. *R. 18.* This request was granted on June 9, 2004, *R. 19, Marginal Order*, and the revised pleading was filed on June 11, 2004, *R. 25, First Amended Complaint; Appendix G, p. 52g.* Respondent, State of Ohio (hereinafter the "State"), was joined to the proceedings therein. The theories of recovery remained the same, except the claim for civil rights violations under 42 U.S.C. §1983 (Count III) were abandoned. Both Quest and the State again submitted Answers denying liability. *R. 26 & 35.*

On August 10, 2004, the State moved for dismissal pursuant to Fed.R.Civ.P. 12(b)(6) (hereinafter "Defendant's Motion"). *R. 36, Motion to Dismiss.* It was argued therein that judgment should be granted under Fed.R.Civ.P. 12(b)(1) and (6) because (1) a valid claim for relief had not been stated and (2) Eleventh Amendment immunity barred any recovery. Petitioners' timely response was submitted on August

27, 2004. The State's Reply followed on September 13, 2004.

C. Disposition Below.

In a ruling dated September 20, 2004, Judge James S. Gwin granted the State's Motion only in part. *District Order, Appendix E, p. 20e.* In his opinion, he concluded that the Eleventh Amendment had been properly abrogated for purposes of the Rehabilitation Act but not the ADA. *R. 47, Opinion and Memorandum, pp. 4-11; Appendix E, pp. 24e-31e.* It was further determined that while a claim for "direct discrimination" could not be maintained, the pleading did allege a potentially viable *Johnson* claim against the State as the owner of the building and grounds where the alcohol treatment program was conducted. *Id., pp. 14-15; Appendix E, pp. 34e-35e.* Following this ruling, the parties proceeded to prepare for trial.

Eventually, Petitioners reached a settlement agreement with Quest which resulted in a dismissal of all claims against the company on December 14, 2004. *R. 86, Notice of Dismissal.* Shortly before trial, Petitioners and the State entered their own partial settlement. By stipulation, all pending claims were dismissed. *R. 90, Order.*[2] The parties' written release specifically provided that Petitioners retained their right to appeal the dismissal of their claim against the State under the ADA.

Petitioners commenced a timely appeal to the Sixth Circuit. The Court's opinion was issued on March 27, 2006. *Appendix C, appended hereto.* Oddly, it was concluded that:

---

[2] This entry was supplanted by a further Order dated January 28, 2005. *R. 94, Order.*

> The district court correctly found that [Petitioners] did not sufficiently plead that the State of Ohio is responsible for Quest's alleged wrongdoing. The first amended complaint is deficient because it does not satisfy our pleading requirements under *Johnson* for imposing liability upon the State of Ohio.

Sixth Circuit Opinion, p. 9; Appendix C, p. 15c. Actually, the District Judge had not found that the pleadings were defective with regard to the claim that the State could be liable in accordance with *Johnson v. City of Saline*, 151 F.3d 564, 571 (6th Cir. 1998), due to its ownership of a public building that was not handicap compliant. *District Court Opinion, p. 14; Appendix E, p. 33e.* No explanation was provided by the Sixth Circuit for how he erred in this regard. The appellate court did find, as the District Judge had, that Congress had violated the State's Eleventh Amendment immunity in enacting Title II of the ADA. *Sixth Circuit Opinion, pp. 6-13; Appendix C, pp. 11c-18c.*

Petitioners filed a timely Petition for Writ for Certiorari in this Court on June 23, 2006. *Sup.Ct. Case No. 06-263.* No Brief was submitted by the State in opposition. On September 29, 2006, the United States moved to intervene in the proceedings in accordance with 28 U.S.C. §2403(a). The government identified the Question Presented as follows:

> The United States is seeking to intervene in this litigation, pursuant to 28 U.S.C. 2403(a), for the limited purpose of defending the constitutionality of an important federal civil rights law. This brief accordingly addresses only the first

question presented by the petition:

> Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 to 12165, is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, as applied to correctional programs and services. [emphasis added]

Brief of the United States as Intervenor, p. I. With leave of court, the State then submitted a Brief on December 15, 2006 urging this Court to decline to consider the matter further. Petitioners' Reply was filed on December 22, 2006.

In an Order dated January 16, 2007, the United States was granted leave by the Supreme Court to intervene in the proceedings. An Entry was issued that same day declaring:

> *** The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of 28 U.S.C. §24303(a) to consider the views of the United States. [emphasis added]

Haas v. Quest Recovery Servs., ___ U.S. ___, 127 S.Ct. 1121, 166 L.Ed.2d 888 (2007). Justice Ginsburg furnished a concurring opinion questioning the basis for the Sixth Circuit's "alternative rulings", which were described as "puzzling". *Id.*

On remand, the parties were instructed to file "letter briefs" addressing the views of the Intervenor. The panel then issued its Opinion on Remand on August 21, 2007. *Appendix B, p. 2b.* The Sixth Circuit

again refused to reexamine its holding that Title II violated the Eleventh Amendment, which had been the focus of the United States' intervention Brief, and concluded instead that the Amended Complaint still failed to meet the notice-pleading requirements set forth in Fed.R.Civ.P. 8(a). *Id.* No discernable attempt was made to address any of the concerns in the prior opinion that had been identified by Justice Ginsburg. Petitioners filed a timely Petition for Re-Hearing *En Banc*, which was denied in an Order dated November 23, 2007. *Appendix A, p. 1a.* Petitioners now seek further review in the Supreme Court of the United States.

ARGUMENT FOR GRANTING WRIT

I The Opinion of the Sixth Circuit Court of Appeals squarely conflicts with decisions of the First, Ninth, and Eleventh Circuit Courts of Appeal and unjustifiably subverts Congressional intent to redress all forms of governmental handicap discrimination through Title II of the Americans with Disabilities Act.

A. Overview.

This Court justly granted certiorari previously in these proceedings and should do so again now. After this action was returned to the Sixth Circuit, the panel plainly did not comply with the instructions "to consider the views of the United States." *Haas*, 127 S.Ct. at 1121. Title II or the ADA remains largely unenforceable in the Sixth Circuit as a result of outdated precedent. The federal government had determined that this case was sufficiently monumental to warrant intervention "for the limited purpose of

defending the constitutionality of an important federal civil rights law." *Brief of United States as Intervenor, U.S. Sup. Ct., Case No. 06-263, p. I.*

Title II of the ADA seeks to eradicate handicap discrimination suffered in connection with public services by allowing injunctive relief and damage awards to be sought against governmental entities, including the states. *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675, 121 S.Ct. 1879, 1889, 149 L.E.2d 904 (2001); *Helen L. v. DiDario*, 46 F.3d 325, 335 (3rd Cir. 1995). Because the Sixth Circuit is plainly dodging the issue, the citizens of Ohio, Kentucky, Tennessee, and Michigan do not enjoy the full benefits and protections which Congress intended to establish through this vital enactment. In contrast to other Circuits which have held that the enactment is fully enforceable, the Sixth Circuit clings to the peculiar view that Title II remedies are available against states only in the rare instance that the ADA claim happens to involve "due process" rights to access to a courthouse. *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002) (*en banc*). As Petitioners and the United States were attempting to establish, *Popovich's* holding that Title II is largely unconstitutional is no longer viable in light of recent Supreme Court opinions.

B. Implications of *U.S. v Georgia.*

The notion that the Eleventh Amendment immunity may be avoided only when an ADA claimant's due process rights are at stake has been tacitly rejected by this and other federal courts. After the appeal was briefed and argued in the Sixth Circuit, the U.S. Supreme Court issued *United States v. Georgia*, 546 U.S. 151, 126 S.Ct. 877, 881-882, 163 L.Ed.2d 650 (2006). That lawsuit involved a

paraplegic state prison inmate seeking damages under Title II of the ADA. *Id.*, 546 U.S. at 879. No meaningful due process rights were alleged to have been violated. The similarities to the instant action were not lost upon the Solicitor General, who has observed that:

> That decision arose, moreover, in the context of claims like [Plaintiffs'] concerning inaccessible correctional facilities and damages for injuries suffered as a result of such inaccessibility. Compare *Georgia*, 126 S. Ct. at 879 (alleging inaccessible bathroom facilities and correctional programs), with Pet. App. 3a-4a (same).

Sup. Ct. Brief for the United States as Intervenor, p. 7. Writing for the unanimous Court, Justice Antonin Scalia reasoned in *Georgia* that:

> While the Members of this Court have disagreed regarding the scope of Congress's "prophylactic" enforcement powers under § 5 of the Fourteenth Amendment, *** no one doubts that § 5 grants Congress the power to "enforce... the provisions" of the Amendment by creating private remedies against the States for *actual* violations of those provisions. "Section 5 authorizes Congress to create a cause of action through which the citizen may vindicate his Fourteenth Amendment rights." *** This enforcement power includes the power to abrogate state sovereign immunity by authorizing private suits for damages against the States. *** Thus,

> insofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity. [italics original; underlining added; citations omitted]

Georgia, 546 U.S. at 881-882. The high court proceeded to hold that a remand was necessary in order to permit the inmate to revise his pleadings to focus upon discriminatory practices violative of the Fourteenth Amendment. *Id.*, at 881-882. As the United States has observed, the Sixth Circuit's analysis in the instant appeal was irreconcilable with *Georgia* since the panel had proceeded to rule in favor of the State, without first addressing "whether any of [Plaintiffs'] claims seek relief 'against the State[] for conduct that *actually* violates the Fourteenth Amendment,' 126 S.Ct. at 882. *Sup. Ct. Brief for the United States as Intervenor, pp. 8-9.*

C. Petitioners' Equal Protection Claim.

Like the convict in *Georgia*, 546 U.S. 151, Petitioner Rachel Haas has sufficiently alleged that her rudimentary Fourth Amendment rights were violated by the State's disparate treatment of her, which was the result of policies lacking any rational basis. While she did not include explicit citations to the "Fourteenth Amendment" in the pre-*Georgia* First Amended Complaint, even the District Court recognized that "Plaintiffs' ADA claims against Ohio sound in equal protection".[3] *Haas v. Quest Rec. Servs.*,

---

[3] Rather obviously, Petitioners did not seek relief for violations of their "constitutional right[s]" under 42 U.S.C. §1983 because it is well-settled that the

338 F.Supp.2d 797, 803 (N.D. Ohio 2004). Petitioners not only alleged unlawful discriminatory practices in their pleadings, but also established during the summary judgment phase of the proceedings that disabled individuals (most notably Petitioner Rachel Haas) were suffering onerous disparate mistreatment by being confined in State-owned facilities that were far from handicap compliant.[4]

Eleventh Amendment does bar such claims. *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); *Alabama v. Pugh*, 438 U.S. 781, 782, 98 S.Ct. 3057, 3058, 57 L.Ed.2d 1114 (1978). This immunity has been overridden by Title II of the ADA (at least in the First, Ninth, and Eleventh Circuits) and Petitioners' claim of disability discrimination against the State was thus predicated strictly upon this federal statute. In effect, Title II furnishes a damages remedy against States for Fourteenth Amendment violations that §1983 did not. It should also be remembered, moreover, that Petitioners were required to prepare their First Amended Complaint without the benefit of *Georgia*, 546 U.S. 151.

[4] A duly authenticated architectural report was attached to Petitioners' Revised Motion for Partial Summary Judgment on Counts I and II of September 30, 2004 as Exhibit A. The materials were submitted during the summary judgment phase of the proceedings and did not in any sense alter the allegations contained in the First Amended Complaint. Given that this lawsuit is – above all else – a search for the truth, the additional information that has been furnished should be considered in evaluating whether a potentially valid claim for relief has been stated. *American Inter-Fidelity Exchange v. American Re-*

No evidence was ever submitted disputing that (1) the State owned the building at issue, (2) the facility failed to meet federally mandated handicap accessibility requirements, and (3) Petitioner suffered personal injury, embarrassment, and substantial hardship as a result that her non-disabled counterparts were not required to endure. No attempt has ever been made to identify a rational basis for the State's decision not to furnish handicap accessible DIP facilities. Consequently, clear and unmistakable violations of the equal protection guarantees of the Fourteenth Amendment had been alleged – if not conclusively proven – by Petitioners.[5] *Cleburne v. Cleburne Living Cntr.*, 473 U.S. 432, 448, 105 S.Ct. 3249, 3258, 87 L.Ed.2d 313 (1985). In accordance with the opinion that was recently issued in *Georgia*, 546 U.S. 151, Section 5 plainly permits such "actual violations" to be remedied and there is no need for any inquiry into the "congruence and proportionality" of Congress' efforts to eradicate handicap discrimination prophylactically.

Petitioners' "landlord liability" theory of recovery

Insurance Co., 17 F.3d 1018, 1021-1022 (7th Cir. 1994); *Daush v. Rykes*, 52 F.3d 1425, 1427 fn. 3 (7th Cir. 1994). Turning a blind eye towards the facts that have been developed during the summary judgment proceedings would hardly serve the interests of justice.

[5] The Sixth Circuit had observed that the Fourteenth Amendment requires "only" rational basis review when the handicapped are involved. *Appendix C, Opinion of March 27, 2006, p. 12.* No explanation has been offered, however, as to how a "rational basis" can exist for the State's refusal to furnish handicap accessible DIP facilities. *Cleburne*, 473 U.S. at 448.

had previously been recognized in the Sixth Circuit (and elsewhere). In *Johnson,* 151 F.3d 564, the Court examined a case in which a disabled plaintiff filed a claim against the city because the second floor of a city-owned radio station building he was required to use in his business was allegedly inaccessible to him. The District Court rejected his Title II claim in part on the grounds that he was leasing the premises from the municipality and was thus solely responsible for providing the accommodations. *Id.,* at 571. Writing for the majority, Judge Boggs explained on appeal that:

> Though it was run by [plaintiff], the station was located in a city building, and operated there rent free. It is clear from the Technical Assistance Manual construing Title II that public entities have a duty to provide accessible facilities even when those facilities are used by contractors. As noted above, the Manual is entitled to substantial deference for this interpretation of Title II. The Technical Assistance Manual gives the specific example of a city-owned building in which the first floor is leased by private businesses. Even though the businesses may be subject to Title III of the ADA (42 U.S.C. §12181 *et seq.*, regarding public accommodations), the city is simultaneously subject to Title II because it is a landlord. TITLE II TECHNICAL ASSISTANCE MANUAL §1.3000. This section applies here: the city definitely is a landlord, required by Title II to reasonably accommodate the disabled public. [emphasis added]

Id., at 571-572. Quite clearly, the State could not circumvent its "duties" under Title II of the ADA in the case *sub judice* with a sublease of the premises to Quest Recovery Services, Inc.

D. The Conflict Over the "Due Process Only" Standard.

As is the case with countless other victims of state-sponsored handicap discrimination, Title II remedies are unavailable to Petitioner because the Sixth Circuit persists in abiding by the *en banc* ruling in *Popovich*, 276 F.3d 808, which holds that Eleventh Amendment immunity has been abrogated for purposes of Title II only in those rare instances where some form of the "due process" right of access to the courts have been violated. This counterintuitive reasoning cannot be reconciled with *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 123 S.Ct. 1972, 155 L.Ed.2d 93 (2003), which involved nothing more than a male state employee's purely "equal protection" right to be free from impermissible gender discrimination. The Sixth Circuit responded to this development in the instant action by drawing a line between gender and handicap discrimination based upon the "heightened level of constitutional scrutiny" that is owed to the former two classifications. *Appendix C, Opinion of March 27, 2006, p. 12.* That artificial demarcation now cannot be harmonized with *Georgia*, 546 U.S. 151, which was also brought by a handicapped prison inmate. It is now evident that the Supreme Court does not share the view that the disabled are deserving of less protection than others under appropriate Eleventh Amendment review.

The Brief for the United States as Intervenor forcefully demonstrates that the federal appellate courts are now split over whether Congress is confined

to just remedying discrimination that also entails due process concerns. The Sixth Circuit's "due process only" standard was tacitly rejected not long ago in *Toledo v. Sanchez*, 454 F.3d 24 (1st Cir. 2006). Even though a student suffering from schizoaffective disorder had not established that he had been denied access to the courts, the First Circuit concluded that his ADA claim against a state university was viable since the congressional response to pervasive handicap discrimination in public education satisfied the "congruence and proportionality" test identified in *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624. *Toledo*, 454 F.3d at 40.

In *Phiffer v. Columbia Riv. Corr. Inst.*, 384 F.3d 791, 792-793 (9th Cir. 2004), the Ninth Circuit held that Congress had completely abrogated Eleventh Amendment immunity with regard to all types of Title II ADA claims.[6] Since no exceptions or limitations were established for this broad rule, it is evident that the instant Petitioners' claim would have been viable in that jurisdiction. In the proceedings below District Judge Gwin dismissed *Phiffer* on the grounds that "the Ninth Circuit applies a different analysis than the Sixth Circuit precedent that guides this Court ***." *District Court Order, p. 9; Appendix E, p. 29e.*

The Ninth Circuit's more expansive view of

---

[6] This Conclusion was reached even after this Court had directed the Ninth Circuit to consider the implications of the recent ruling in *Lane*, 541 U.S. 509. *Columbia Riv. Corr. Inst. v. Phiffer*, 541 U.S. 1059, 124 S. Ct. 2386, 158 L.Ed.2d 960 (2004). A second request for *certiorari* was then denied. *Columbia Riv. Corr. Inst. v. Phiffer*, ____ U.S. ___, 126 S. Ct. 1140, 163 L.Ed.2d 999.

Congressional authority is also shared by the Eleventh Circuit. In *Association for Disabled Americans v. Florida Intl. Univ.*, 405 F.3d 954 (11th Cir. 2005), it was held that a state university could be sued under Title II of the ADA for failing to provide sign language interpreters and necessary aides to deaf students. Such a claim would have been subject to a quick dismissal in the Sixth Circuit because only those protected classes "entitled to a heightened level of constitutional scrutiny" can avoid Eleventh Amendment immunity. *Sixth Circuit Opinion, p. 12; Appendix C, p. 18c.* The plaintiffs in *Association for Disabled Americans* were allowed to proceed, on the other hand, with a discrimination claim based solely upon their right to access to educational services. *Id.*, 405 F.3d at 957-958. As the Eleventh Circuit openly acknowledged, "classifications relating to education only involve rational basis review", *Id.* at 957, which is precisely what led the Sixth Circuit to conclude that the handicap cannot surmount the Eleventh Amendment. *Sixth Circuit Opinion, p. 12; Appendix C, p. 18c.*

Apart from the conflict amongst the circuit courts, the United States has offered a second criticism of the Sixth Circuit, which centers upon an issue that Petitioners had been pressing throughout these proceedings without success. The refusal in the Sixth Circuit to recognize any abrogation of the Eleventh Amendment beyond the realm of due process is inconsistent with the holding of *Tennessee v. Lane*, 541 U.S. 509, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004). The Solicitor General has reasoned that:

> [T]he court of appeals' holding that *Lane* has no relevance outside of court-access cases conflicts with the Fourth Circuit's

> decision in *Constantine v. Rectors & Visitors of George Mason University*, 411 F.3d 474 (2005). In *Constantine*, which involved Title II's application to public education, the Fourth Circuit held that *Lane's* analysis precluded adherence to prior circuit precedent holding Title II's abrogation unconstitutional in its entirety. *Id.* at 486 n.8 (*Lane* renders the reasoning that underlay prior circuit precedent "obsolete").
>
> The court of appeals' misapplication of *Lane* provides an additional basis to vacate the judgment below ***.

Sup. Ct. Brief of United States as Intervenor, p. 13. The time has now come for this Court to dispel the unduly restrictive view of Congressional authority that was adopted in *Popovich*, 276 F.3d 808, which does not appear to have been embraced by any court outside the Sixth Circuit in the post-*Georgia* era.

> **II. The Sixth Circuit's overly expansive view of absolute judicial immunity now permits governmental entities in that jurisdiction to discriminate with impunity against anyone who is subject to a judicial order.**

The Sixth Circuit also held in the original opinion that Petitioners' entire cause of action was barred by the doctrine of absolute judicial immunity. *Sixth Circuit Opinion, pp. 7-8; Appendix C, pp. 13c-14c.* The panel's reasoning was that Petitioner Rachel Haas' claim that she had been ordered to be confined in a non-handicap accessible facility was really "an attempt to sue the municipal court judge." *Id., at 7;*

Appendix C, p. 13c. Since the Judge "clearly was acting both within his jurisdiction and within his judicial capacity when he issued an order sentencing [Petitioner] to two six-day driver intervention programs" no claim could be pursued against the State. *Id., pp. 7-8; Appendix C, pp. 13c-14c.*

After the appeal was returned to the Sixth Circuit by this Court, the panel continued to insist that the only identifiable "state actor" was the municipal court judge. *Appendix B, p. 4b.* The Court refused to acknowledge that numerous other state administrators and bureaucrats would have been far more likely to have been responsible for the fact that the State-owned building where the DIP classes were being held was far from handicap compliant. *Id.* By artificially constraining Petitioners' claims to an assault upon the "municipal court judge", the Sixth Circuit was able to return to the mantra of "absolute judicial immunity". *Id.*

If allowed to stand, the consequences of this myopic ruling will be profound. This Court recognized some time ago that handicapped inmates are entitled to pursue otherwise valid Title II ADA claims based on disparate treatment suffered in connection with their sentences and confinement. *Pennsylvania Dept. of Corr. v. Yeskey*, 524 U.S. 206, 118 S. Ct. 1952, 141 L.Ed.2d 215 (1998). Since all such prisoners are, by necessity, subject to a judge's sentencing order, no such claim can now be pursued in the Sixth Circuit. Ordering a disabled individual to be confined in a non-handicap compliant facility is now protected by absolute judicial immunity. *Sixth Circuit Opinion, pp. 7-8; Appendix C, pp. 13c-14c.*

Even more troubling, the appellate court's short-sighted ruling paves the way for the creation for

special prisons for blacks, Hispanics, Arabs, and other minorities. So long as a judge has ordered the individual to be confined in the segregated facility "absolute judicial immunity" will attach and preclude even a constitutional claim from being filed under 42 U.S.C. §1983 or any other provision of law.[7] Even where (as in Petitioners' case) these minority-only facilities subject their occupants to harsher and more onerous treatment than the general prison population, no redress will be available

The Sixth Circuit's overly broad application of judicial immunity is disturbing. As established in *Johnson*, 151 F.3d at 571-572, the State was required to ensure, as a landlord, that its building complied with federal regulations designed to protect the disabled. This was not done and Petitioner suffered a nightmarish experience over six days that her non-disabled counterparts were not required to endure. Immunizing the State from the liability that Congress has elected to impose through Title II on the grounds that Petitioner was subject at the time to a valid court sentencing order is both illogical and antithetical to the noble objectives of the ADA.

The lower courts' immunity analysis fails to account for the critical distinction between judicial and ministerial acts. Petitioner has never challenged the length, terms, and conditions of the sentence that Municipal Judge Kubilus imposed upon her. Her

---

[7] When judicial immunity applies, not even constitutional rights can be vindicated. *Pierson v. Ray*, 386 U.S. 547, 87 S. Ct. 1213, 18 L.Ed.2d 288 (1967); *Mireles v. Waco*, 502 U.S. 9, 112 S. Ct. 286, 116 L.Ed.2d 9 (1991). Great care must therefore be taken in defining the contours of this powerful privilege.

position is that Title II of the ADA requires that she be allowed to fully participate in and benefit from the drug/alcohol treatment programs that were being provided to non-handicapped DUI offenders as an alternative to incarceration. *42 U.S.C. §12132.* Judicial immunity is unavailable for ministerial acts performed during the course of a legal proceeding, even when undertaken by a judge. *Ex parte Commonwealth of Virginia,* 100 U.S. at 348; *Forrester v. White,* 484 U.S. 219, 227-229, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988); *Duvall v. County of Kitsap,* 260 F.3d 1124, 1133-1135 (9th Cir. 2001). The decision of whether or not to offer a handicap accessible DIP facility to disabled offenders could have been made by a court administrator, departmental chief, or some other non-judicial state officer or employee. Indeed, there is no reason whatsoever to believe that Municipal Judge Kubilus had intended for Petitioner to be confined in a non-compliant facility. No logical reason exists for cloaking the State's refusal to comply with Title II with absolute judicial immunity.

III. Petitioners' First Amended Complaint alleging a claim of Title II disability discrimination satisfies the notice-pleading requirements imposed by Fed.R.Civ.P. 8(a), particularly given that the pleading was prepared without the benefit of *Georgia*, 546 U.S. 151.

As with the original Opinion which had been issued earlier in this protracted appeal (*Appendix C*), the Sixth Circuit's remand order refuses to consider the continued viability of *Popovich*, 276 F.3d 808, by imposing exceedingly high pleading requirements upon Petitioners. Not a single Justice on the Supreme Court had expressed any concern over the sufficiency

of the First Amended Complaint at the time that the proceedings were remanded to the appellate court for consideration of the United States' views. *Haas*, 127 S.Ct. 1121. This pleading had been attached as Appendix E to the Petition for Writ of Certiorari and, it is safe to assume, there would have been no point in ordering a remand if this Court had been in agreement with the Sixth Circuit that Petitioners had failed to meet the notice-pleading requirements set forth in Fed.R.Civ.P. 8(a). In her concurring opinion, Justice Ginsburg addressed the appellate panel's ruling in this regard and reasoned that:

> *** [P]etitioners asserted, as a discrete basis for Ohio's liability, the State's ownership of the building housing the private correctional facility to which Haas as assigned. See Dept. of Justice, Civil Rights Division, Disability Rights Section, Americans with Disabilities Act: Title II Technical Assistance Manual § 1.3000 (Nov. 1993) (explaining that a public entity may be liable as a landlord). The Sixth Circuit held that petitioners failed to satisfy special "pleading requirements" set forth in *Johnson v. Saline*, 151 F.3d 564 (1998), for alleging a claim against Ohio as a landlord. Under this Court's jurisprudence, however, federal courts ordinarily have no warrant to impose heightened pleading standards not prescribed by statute or rule. See, *e.g., Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993). Neither *Johnson* nor the decision at hand offers any

> justification for applying special pleading rules to Title II claims. [emphasis added]

Id. Justice Ginsburg's concurrence concluded with a simple request.

> If, on remand, the Court of Appeals again holds that petitioners failed to state a claim under Title II, this Court would benefit from a fuller statement of the reasons underlying that decision.

Id., p. 1.[8]

This request was ignored upon remand and the Sixth Circuit simply devised new grounds for concluding that the First Amended Complaint was still fatally defective. *Appendix B, p. 6b.* District Judge Avern Cohn (sitting by assignment), opined for the panel that Petitioners had failed to (1) specifically name a "state actor", (2) allege that the building at issue was constructed at a time that would avoid application of the ADA's grandfather clause, and (3) otherwise establish an entitlement to recovery under the principles established in *Georgia*, 546 U.S. 151. *Id., pp. 5b-6b.* Notably, the panel had not expressed any concern with these supposed pleading deficiencies in the original opinion which had been issued on

---

[8] Justice Ginsburg also inquired as to whether the settlement agreement that had been entered between the parties with respect to the Rehabilitation Act claim also barred a landlord liability theory under Title II of the ADA. *Haas*, 127 S.Ct. at 1121. In a Letter Brief that was issued to the Sixth Circuit on April 19, 2007 upon remand, the State acknowledged that the Title II claim had been specifically excluded from the scope of the Release.

March 27, 2006. *Appendix C, p. 7c.* The Sixth Circuit's rejection of the pleading had been based at that time upon completely different "defects", which Justice Ginsburg cogently addressed in her concurring opinion. *Haas,* 127 S.Ct. at 1121 (Ginsburg, J., concurring).

The manifest unfairness of the Sixth Circuit's elevated pleading standard for Title II claimants is aptly reflected by the second opinion's heavy reliance upon *Georgia*, 546 U.S. 151. *Appendix B, pp. 5b-6b.* That seminal decision was not released until January 10, 2006, which was roughly nineteen (19) months after the First Amended Complaint had been filed.[9] *Appendix G, p. 52g.* As previously established herein, the *Georgia* opinion furnished considerable clarification with regard to how Eleventh Amendment immunity is to be analyzed in connection with claims sounding in equal protection. The appellate court's harsh criticisms of Petitioners for failing to anticipate this substantial modification in the law and fashion their pleading accordingly should be rectified by this Court.

The Sixth Circuit's post-remand grounds for rejecting the First Amended Complaint are patently nonsensical. First, it was observed that:

> As an initial matter, the Amended Complaint does not name in its caption any state actor.

Id., p. 3. What federal law or rule requires a "state

---

[9] Indeed, the parties briefing in the appeal to the Sixth Circuit had been completed and oral argument had been concluded at the time that *Georgia* was issued.

actor" to be named in the caption of a pleading?[10] The only Defendant remaining in this action, State of Ohio, is unquestionably a sovereign entity capable of being sued. *Southern Gum Co. v. Laylin*, 66 Ohio St. 578, 64 N.E. 564 (1902), paragraph one of the syllabus; *State v. Bob Manashian Painting*, 121 Ohio Misc.2d 99, 782 N.E.2d 701, 704-705 (Cuy. C.P. 2002). As Justice Ginsburg has observed, Petitioners' Title II claim is based upon "the State's ownership of the building housing and private correctional facility to which [she] was assigned." *Haas,* 127 S.Ct. at 1121. The "state actors" who are most likely at fault for the State's failure to comply, as landlord, with mandatory handicap accessibility requirements are the officials and employees who never bothered to inspect the facility and consult the applicable regulations. Even if it were somehow appropriate for Petitioners to sue such individuals for damages when they were plainly acting within their official capacities, this hardly means that the lawful owner of the structure – the State of Ohio – is an improper party.

The First Amended Complaint was also found to be defective because:

> Here, the [Plaintiffs] do not allege that the building was built after the enactment of the ADA or if built earlier,

---

[10] The Court may be referring to an Ohio statute that requires state departments and agencies to be identified in complaints filed in the Ohio Court of Claims. *O.R.C. §2743.13(A).* This enactment serves purely administrative functions, is plainly procedural, and can have no relevance in a federal lawsuit. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

> that it was renovated after that date. They allege no facts regarding the State of Ohio's obligations under the ADA with respect to the Quest facility or regarding the Quest facility itself.

Appendix B, p. 6b. In its Brief to the appellate court, not even the State had suggested the Petitioners were required to include such minute details in their Complaint.[11] This argument was first raised by the State following remand in a Letter Brief that was submitted on April 19, 2007 and, as a result, Petitioners were precluded from responding.

Just as Justice Ginsburg had observed previously, the appellate court is again imposing a heightened pleading standard upon ADA claimants that has no basis in the law. It is simply unrealistic to expect that, before any discovery can be conducted, a pleader should be able to identify the date that a non-

---

[11] Prior to the Supreme Court's remand, the State's seemingly endless nit-picking with Petitioners' pleadings was founded upon the notion that "direct discrimination" must be alleged for any Title II claim to succeed. *Final Brief of Appellee State of Ohio, pp. 9-10.* In other words, the State seemed to feel at the time that unless one of its officers, employees, or agents has taken affirmative steps to purposely discriminate against a handicapped individual, Title II liability can never be imposed. The Sixth Circuit's decision in *Johnson*, 151 F.3d 564, contains no such requirement. Building owners (including the government) cannot avoid the consequences of their failure to abide by their "duty" to implement handicap accessibility requirements simply by claiming that no one acted "directly" and "deliberately" to discriminate.

handicap accessible building was constructed and identify each renovation that was thereafter undertaken.[12] No attempt has been made by the panel to explain, as Justice Ginsburg had requested, why the Sixth Circuit expects ADA claimants to furnish

---

[12] By all appearances, the Sixth Circuit is the first to hold that an ADA complaint must anticipate and preempt any defense arguments based upon regulatory "grandfather clauses". *Appendix B, p. 5b-6b.* Far less onerous pleading standards are followed in other jurisdictions, as it was recognized in *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002), that:

> To state a claim of disability discrimination under Title II, the plaintiff must allege four elements: (1) the plaintiff is an individual with a disability; (2) the plaintiff is otherwise qualified to participate in or receive the benefit of some public entity's services, programs, or activities; (3) the plaintiff was either excluded from participation in or denied the benefits of the public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (4) such exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability. [citation omitted]

See also *Stevens v. Harper*, 213 F.R.D. 358, 374 (E.D. Cal. 2002); *McIntyre v. Robinson*, 126 F.Supp.2d 394, 408 (D. Md. 2000). Neither the State, nor the Sixth Circuit, has ever suggested that Petitioners have failed to allege these basic elements of an ADA claim.

substantially more than just "a short and plain statement of the claim showing that the pleader is entitled to relief". *Fed.R.Civ.P. 8(a).* When viewed in their entirety, the detailed allegations appearing in the First Amended Complaint are more than sufficient to satisfy the liberal pleading requirements imposed by the Civil Rules.[13] *In re NationsMart Corp. Sec. Lit.*, 130 F.3d 309, 315-316 (8th Cir. 1997); *New York State Waterways Assn. v. Diamond*, 469 F.2d 419, 421 (2nd Cir. 1972). It is difficult to believe, moreover, that this high court would have bothered to grant *certiorari* and ordered a remand for consideration of the federal government's position if the pleading that was attached to the first Petition for Certiorari was really was fatally defective.

In the second decision upon remand, the panel plainly lost sight of the standard of review applicable to dismissals on the pleadings.[14] The opinion declares

---

[13] It should not be forgotten that the pleadings must be liberally construed for the purpose of determining whether a cause of action has been sufficiently stated. *Ott v. Midland-Ross Corp.*, 523 F.2d 1367, 1369 (6th Cir. 1975). In accordance with *Fed .R. Civ. P. 8(e)*, such filings should be interpreted in a manner which achieves substantial justice. *Hazen v. Western Union Telegraph Co.*, 518 F.2d 766, 770 (6th Cir. 1975). Courts should be mindful that only a "short and plain statement of the claim" is required. *Michaels Building Co. v. Ameritrust Co.*, 848 F.2d 674, 679 (6th Cir. 1988).

[14] Even the State recognized that: "When deciding a motion to dismiss, a court must construe the allegations contained in the complaint in favor of the plaintiff, *Scheurer v. Rhodes*, 416 U.S. 232, 236 (1974),

that:

> We agree with the State of Ohio that its driver intervention programs ("DIPs"), when viewed in their entirety, are readily accessible to and usable¶ [*sic*] by individuals with disabilities. Ohio law requires that all entities providing DIPs comply with the ADA. *See* Ohio Admin. Code §3793:4-1-01(R). And Ohio law provides that "[t]he rights of clients for each [DIP] shall include, at a minimum, the following: ... (12) The right not to be discriminated against for receiving services on the basis of ... disability. ... Ohio Admin. Code §3793: 4-1-02(GG)(12). Additionally, Ohio requires each DIP to meet specific handicap accessibility requirements as set forth in §3793:4-1-02(CC) in order to be certified as a DIP, and only certified DIPs may lawfully operate in Ohio, *see* §3793:4-1-01(D). [emphasis added]

Appendix B, p. 6b. Certainly, the appellate court did not mean to suggest that the dilapidated facility where Petitioner was housed really is "accessible" to the disabled, and there is no need for any judicial inquiry, because that's what Ohio law requires.

The allegations that had been raised, which were supposed to be accepted as true by the appellate court, were that Petitioner, Rachel Haas, could not fit

---

and must accept all factual allegations as true, *Collins v. Nagle*, 892 F.2d 489, 493 (6th Cir. 1989)." *Final Brief of Appellant State of Ohio, p.5.*

her wheelchair through the narrow doorways. *Appendix G, pp. 55g-57g.* In order to participate in the six (6) day DIP program, she was required to hop up and down several flights of stairs on her one leg several times a day because there was no elevator. *Id.* Unable to carry her wheelchair down the steps to the cafeteria, she had to hop across the floor while carrying her tray of food. *Id.* Because of the lack of handrails, Petitioner had to take showers while seated on the floor and she struggled in and out of bathroom stalls. *Id.* How any court could hold, in a review of a dismissal on the pleadings, that the buildings where Ohio holds DIP programs "are readily accessible to and usable by individuals with disabilities" is absolutely mystifying. *Appendix G, p. 55g.*

CONCLUSION

The Sixth Circuit's Opinion in the proceedings below unjustifiably curtails Congressional authority to protect the rights of the disabled. As properly recognized in the conflicting Opinions of the First, Ninth, and Eleventh Circuits, Title II of the ADA properly abrogates the Eleventh Amendment where important rights sounding in equal protection are at stake. Petitioner's claim that she suffered disparate treatment by being housed in a non-handicap accessible DIP facility falls squarely within the brand of insensitive and unacceptable conduct that the legislature was attempting to eradicate. She should not be denied relief simply because she cannot allege a due process violation and does not fall within one of the protected classes that is entitled to heightened judicial scrutiny. Finally, immunizing the State from its dereliction simply because a judge's order was involved will allow easy circumvention of Title II throughout the penal system and should be forcefully rejected. For these reasons, a Writ of Certiorari should issue with regard to the Sixth Circuit's ill-advised decision.

Respectfully submitted,

/s/W. Craig Bashein
W. Craig Bashein, Esq.
BASHEIN & BASHEIN CO., L.P.A.
Attorneys for Petitioners

/s/Paul W. Flowers
Paul W. Flowers, Esq.
PAUL W. FLOWERS CO., L.P.A.

APPENDIX

No. 05-3147

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RACHEL HAAS, ET AL., Plaintiffs-Appellants, v. QUEST RECOVERY SERVICES, INC., ET AL., Defendants-Appellees.	)	FILED NOV 28 2007 LEONARD GREEN, Clerk ORDER

BEFORE: NORRIS and BATCHELDER, Circuit Judges; and COHN, District Judge.*

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

* Hon. Avern Cohn, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

NOT RECOMMENDED FOR FULL TEXT PUBLICATION

No. 05-3147

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RACHEL HAAS, CAROL HAAS, and RICHARD HAAS,

Plaintiffs-Appellants,

v.

QUEST RECOVERY SERVICES, INC. and STATE OF OHIO,

Defendants-Appellees.

FILED

AUG 21 2007

LEONARD GREEN, Clerk

OPINION ON REMAND

BEFORE: NORRIS and BATCHELDER, Circuit Judges; and COHN, District Judge

AVERN COHN, District Judge.*

This is a case under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* Plaintiffs-Appellants Rachel Haas and her parents, Carol Haas and Richard Haas (collectively referred to as the Haases), filed suit against Defendants-Appellees Quest Recovery Services, Inc. (Quest) and

* The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

the State of Ohio,[1] alleging that Rachel Haas suffered discriminatory treatment based upon her physical disabilities while she was participating in a drug and alcohol counseling program administered by Quest and ordered as part of her punishment after she pleaded guilty to operating a vehicle under the influence of alcohol. As will be explained, this is an opinion following remand from the United States Supreme Court. For the reasons that follow, we conclude, in light of *United States v. Georgia*, 546 U.S. 151 (2006), that the Amended Complaint fails to allege any conduct on the part of the State of Ohio which could be construed as a viable claim under Title II.

I.

The Haases appealed the district court's dismissal of their claim against the State of Ohio under Title II. We affirmed. *Haas v. Quest Recovery Servs., Inc.*, 174 Fed. App'x 265 (6th Cir. 2006). We held that (1) the Amended Complaint failed to state a valid claim under Title II against the State of Ohio, and (2) the State of Ohio was immune from suit under the Eleventh Amendment and Congress had not effectively abrogated that immunity. The United States Supreme Court granted the Haases' petition for certiorari, vacated our decision, and remanded the matter for consideration of the views of the United States, particularly the application of *United States v. Georgia*, 546 U.S. 151 (2006). *Haas v. Quest Recovery Servs., Inc.*, 127 S.Ct. 1121 (2007).

---

[1] The complaint as originally filed named the City of Canton, Ohio, as a defendant. Plaintiffs, however, dismissed all claims against the City and filed a First Amended Complaint ("Amended Complaint") against only the State of Ohio.

II.

Title II of the ADA provides, in pertinent part:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132.

In *Georgia*, the Supreme Court held that a court must apply the following three-part test when confronted with an Eleventh Amendment defense to a Title II claim:

> on a claim-by-claim basis (1) which aspects of the State's alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment, and (3) insofar as such misconduct violated Title II, but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid.

546 U.S. at 159. Thus, under *Georgia*, the constitutional question – abrogation of Eleventh Amendment immunity – will be reached only after finding a viable claim under Title II. The Haases' Title II claim fails under *Georgia's* first prong because the Amended Complaint does not state a valid claim.

The allegations against the State of Ohio under Title II appear in the Amended Complaint as follows:

> At all times herein relevant, the State is a "public entity" as defined by 42 U.S.C. §12131(1) and was thus subject to ADA Title II.
>
> At the time of Plaintiff's conviction and sentencing, the State was directing certain individuals, through its Municipal Court system, to participate in programs and activities such as that being operated by Quest in lieu of actual incarceration. Such privately operated program and activities offered numerous advantages to the participants over the local jails.
>
> In the manner aforementioned, the Court and/or the State violated ADA Title II by failing to ensure that Plaintiff was able to participate in and benefit from the services, programs, and activities that were being furnished to non-handicapped individuals. The Court and/or State further subjected Plaintiff to discrimination by, for example purposes only, ordering her to be confined in a privately operated system that was not handicap accessible and was being operated by untrained and unqualified staff members.

Amended Complaint at ¶ 36-38.

As an initial matter, the Amended Complaint does not name in its caption any state actor. The only state actor even referenced in the Amended Complaint is the municipal court judge, who, as we initially held, and as the State of Ohio points out, is entitled to

absolute immunity.

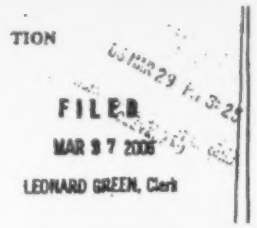
The only allegation in the Amended Complaint which might implicate Title II liability is that the State of Ohio owned the building housing the Quest facility. *See* Amended Complaint at ¶ 14. However, the ADA does not necessarily require a public entity to make its existing physical facilities accessible. *See* 28 C.F.R. §35.150(a)(1). Public entities need only ensure that "each service, program, or activity ... when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. §35.150(a). Only if the building has undergone extensive renovation after the ADA's effective date must the upgrades provide accessibility. *See* 28 C.F.R. §35.350(b)(1). Here, the Haases do not allege that the building was built after the enactment of the ADA or if built earlier, that it was renovated after that date. They allege no facts regarding the State of Ohio's obligations under the ADA with respect to the Quest facility or regarding the Quest facility itself.

Furthermore, public entities need only ensure that "each service, program or activity ... when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a). We agree with the State of Ohio that its driver intervention programs ("DIPs"), when viewed in their entirety, are readily accessible to be usable¶ by individuals with disabilities. Ohio law requires that all entities providing DIPs comply with the ADA. *See* Ohio Admin. Code §3793:4-1-01(R). And Ohio law provides that "[t]he rights of clients for each [DIP] shall include, at a minimum, the following:... (12) The right not to be discriminated against for receiving services on the basis of ... disability ... Ohio Admin.

Code §3792:4-1-01(GG)(12). Additionally, Ohio requires each DIP to meet specific handicapped accessibility requirements set forth in §3793:4-1-02(CC) in order to be certified as a DIP, and only certified DIPs may lawfully operate in Ohio, *see* §3793:4-1-01(D).

Accordingly, we conclude that the Amended Complaint fails to state a claim under Title II of the ADA. In light of this determination, we need not reach the remaining prongs of the *Georgia* analysis.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RACHEL HAAS, CAROL HAAS, and RICHARD HAAS,	)	
Plaintiffs-Appellants,	)	
v.	)	ON APPEAL FROM THE UNTIED STATES
QUEST RECOVERY SERVICES, INC. and STATE OF OHIO,	)	DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO
Defendants-Appellees.	)	OPINION

BEFORE: NORRIS and BATCHELDER, Circuit Judges; and COHN, District Judge*

AVERN COHN, District Judge. This is a case under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* Plaintiffs-Appellants Rachel Haas and her parents, Carol Haas and Richard Haas (collectively referred to as the Haases), filed suit against Defendants-Appellees Quest Recovery Services, Inc (Quest) and the State of Ohio,[1] alleging that Rachel Haas suffered discriminatory treatment

---

* The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

[1] The complaint as originally filed named the City of Canton, Ohio as a defendant. Plaintiffs, however, dismissed all claims against the City and amended the complaint to name the State of Ohio as a party defendant.

based upon her physical disabilities while she was participating in a drug and alcohol counseling program administered by Quest and ordered as part of her punishment after she pleaded guilty to operating a vehicle under the influence of alcohol. The Haases appeal the district court's dismissal of their claim against the State of Ohio under Title II of the ADA, 42 U.S.C. §12132. We affirm.

I. FACTUAL BACKGROUND[2]

On September 19, 2002, Rachel Haas (Haas) was operating an all-terrain vehicle in Louisville, Ohio, while intoxicated. While crossing a road, Haas was hit by a truck and suffered serious injuries, including fractures to her pelvis and arms, a partially severed hand, a crushed leg, and other internal injuries. She was hospitalized for several weeks. During the course of her treatment, her left leg was amputated above the knee, she received a prosthetic right elbow, and a metal rod was placed in her right arm. She was prescribed pain medication and a course of physical therapy upon her release from the hospital.

The local prosecutor charged Haas with driving under the influence of alcohol. OHIO REV. CODE §4511.19(A). She pleaded guilty in the Canton, Ohio, municipal court on February 18, 2003. Prior to her

---

[2] Because the district court granted the State of Ohio's motion to dismiss under Fed.R.Civ.P. 12(b)(1) and 12(b)(6), the factual background is taken from the first amended complaint. *Benzon v. Morgan Stanley Distrib., Inc.*, 420 F.3d 598, 609 n.5 (6th Cir. 2005) (noting that this Court accepts as true all of plaintiff's as well-pleaded allegations when we review a grant of a motion to dismiss for failure to state a claim.)

sentencing, she provided the judge with a letter from her physical therapist, stating that rehabilitation would take three to six months and that "[a]ny disruption of this rehabilitation...would be very detrimental to her progress." The municipal court judge sentenced Haas to 36 days of house arrest and required her to participate in two six-day driver intervention programs at Quest's Massillon, Ohio, facility. The State of Ohio owned the building housing Quest's facility and leased it indirectly to Quest.

Haas, who required a wheelchair, reported for her first six-day stay at Quest's facility on March 13, 2003. The first amended complaint describes her experience as follows:

> Plaintiff was instructed by a Quest employee upon her arrival to proceed with her luggage to the sixth floor of the building. When she asked where the elevator was located, she was told there was none and she would need to use the stairs. The Quest employee refused to provide any assistance to her. With her parents' help, Plaintiff was therefore forced to "scoot" herself up six (6) flights of stairs. In addition to substantial physical pain, cramping, and discomfort, Plaintiff also suffered substantial embarrassment and humiliation as numerous other inmates and Quest staff members climbed the stairs past her.
>
> Initially, Quest's staff would only serve her meals in the basement. Plaintiff was thus required to hop, scoot,

> and crawl up and down the steps without any assistance several times a day. Since she could not bring her wheelchair to the basement, she was forced to hop substantial distances in order to get her food and reach the table...
>
> Plaintiff's wheelchair would not fit into the restroom she was required to use, which was not handicap-accessible. Plaintiff had to sit on the floor of the co-ed shower in order to bathe herself...

In addition to this situation, Haas allegedly fell down three flights of stairs while in the facility, displacing the rod in her arm. When her physical therapist wrote another letter indicating that she was not cleared for stair climbing, she was allowed to take meals in her room, though the complaint state that staff "forgot" to deliver food on several occasions.

Despite a favorable assessment by her counselor, the first amended complaint alleges that the facility's direct "advised her that her attitude had been unacceptable and her completion of the program would not be approved." A hearing was conducted in municipal court on April 4, 2003, which resulted in an order of confinement in the Stark County, Ohio, jail for six days beginning April 7, 2003.

II. PROCEDURAL HISTORY

After completing her sentence without further incident, Haas and her parents filed this lawsuit. The complaint as originally filed listed six counts: (1) handicap discrimination, (2) rehabilitation act violations, (3) civil rights violations, (4)

negligence/intentional tort, (5) infliction of emotional distress, and (6) loss of consortium. The Haases abandoned count three (civil rights violation) when they filed the first amended complaint.

The State of Ohio filed a motion to dismiss arguing that Eleventh Amendment immunity barred recovery and, in the alternative, the Haases did not state a valid claim for relief. The district court granted the State's motion in part, ruling that (1) Title II of the ADA dose not abrogate Ohio's Eleventh Amendment immunity to the Haases' ADA claim, (2) Ohio waived its immunity to the Haases' Rehabilitation Act claim, and (3) the Haases failed to state a claim for direct discrimination against the State of Ohio.

On December 28, 2004, the district court entered an order of settlement, followed by another order on January 28, 2005, which provided "[n]otwithstanding the foregoing [settlement and dismissal], this entry shall have no effect upon Plaintiffs' right to appeal the Order of September 20, 2004 dismissing the Americans with Disabilities Act claims ... on the pleadings." Quest settled the ADA and Rehabilitation Act claims against it for an undisclosed sum. The State of Ohio settled a claim under the Rehabilitation Act premised upon its ownership of the building that housed the Quest facility.

III. ANALYSIS

A. Standard of Review

We review *de novo* a district court's grant of a motion to dismiss under Federal Rule of Civil

Procedure 12(b)(6). *Simon v. Pfizer, Inc.*, 398 F.3d 765, 772 (6th Cir. 2005). A motion under Rule 12(b)(6) is granted when "it is clear that the plaintiff can prove no set of facts in support of [the] claim that would entitle [the plaintiff] to relief." *Miller v. Curie*, 50 F.3d 373, 377 (6th Cir. 1995). In deciding a motion under Rule 12(b)(6), the Court accepts all of the allegations as true and construes the complaint "liberally in favor of the party opposing the motion." *Id.* The Court does not accept the "bare assertion of legal conclusions," *Columbia Nat. Res., Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995), nor does the Court accept "unwarranted factual inferences." *Morgan v. Church's Fried Chicken*, 829, F.2d 10, 12 (6th Cir. 1987).

The applicability of the Eleventh Amendment to claims against a state under the ADA is a question of law that we review *de novo*. *Carten v. Kent State Univ.*, 282 F.3d 391, 394 (6th Cir. 2002).

B. Whether the Haases Stated a Claim Under Title II of the ADA

The Haases say that they sufficiently pleaded direct discrimination by the State of Ohio because the Canton, Ohio, municipal court, which is an arm of the Ohio court system, sentenced Rachel to her treatment program and thus caused her to suffer discrimination. Additionally, the Haases premise liability on the State of Ohio's ownership of the building that housed the Quest facility. The State responds that the Haases attempted, but failed, to link any direct action of the State with the actions of Quest, the private facility.

Title II of the ADA provides, in pertinent part:

[N]o qualified individual with a disability

> shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities or a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. §12132.

To state a claim of disability discrimination under Title II of the ADA, a plaintiff must allege that "(1) she has a disability; (2) she is otherwise qualified; and (3) she is being excluded from participating in, being denied the benefits of, or being subjected to discrimination under a program solely because of her disability." *Jones v. city of Monroe*, 341 F.3d 474, 477 (6th Cir. 2003).

The district court found, and the State does not contest, that the Haases satisfied the first and second elements by alleging Rachel Haas was a qualified individual with a disability. On appeal, the Haases argue, as they did before the district court, that liability should be imposed under Title II of the ADA as a result of the Canton, Ohio municipal court's practice of referring disabled individuals to non-handicap accessible drug and alcohol treatment facilities. Alternatively, the Haases argue that the State should be held liable for failing to ensure that the buildings where these activities were being conducted satisfied handicap accessibility requirements.

The district court astutely observed that the Haases are in effect suing the State of Ohio in an attempt to sue the municipal court judge. Indeed, the Haases contend on appeal that the "Canton Municipal

Court treated [Rachel] far more severally [sic] than her non-handicapped counterparts." The proper inquiry for this line of argument is whether the Canton Municipal Court judge is protected by judicial immunity.

The Supreme Court has made clear that judicial immunity is overcome only in two sets of circumstances: "First, a judge is not immune from liability for nonjudicial actions, *i.e.*, actions not taken in the judge's judicial capacity. Second, a judge is not immune for actions, though judicial in nature, taken in complete absence of all jurisdiction." *Mireless v. Waco*, 502 U.S. 9, 11-12 (1991). Issuing an order is judicial in nature. *Bush v. Rauch*, 38 F.3d 842, 847 (6th Cir. 1994). Thus the Canton Municipal Court judge clearly was acting both within his jurisdiction and within his judicial capacity when he issued an order sentencing Haas to two six-day driver intervention programs.

The Haases also argue that "no logical reason exists for cloaking such routine ministerial acts [as ordering a driver intervention program] with absolute judicial immunity." They argue that the order could have been made by a "court administrator, departmental chief, or some other non-judicial state officer or employee." This argument is of no moment, and the district court did not err in finding that the Canton Municipal Court judge has judicial immunity for his sentencing decision.

With respect to the Haases' position that the State of Ohio should be held liable under Title II of the ADA based on its ownership of the building housing the Quest facility, they primarily rely upon *Johnson v. City of Saline*, 151 F.3d 564 (6th Cir. 1998). In

Johnson, this Court held that a public entity that leases or rents its facilities to non-public entities is subject to Title II of the ADA because it is a landlord. *Id.* at 571-72. Here, the district court found that the State of Ohio is subject to liability as a landlord because an agency of the State, the Ohio Department of Alcohol and Drug Addiction Services, leased the property housing the Quest facility to the Stark County Alcohol and Drug Addition Services Board which, in turn, subleased the facility to Quest. Thus, the remaining question is whether Quest is a public entity and whether the State of Ohio is thereby subject to direct liability.

The *Johnson* court enumerated four factors to identify whether a facility appearing to have both public and private features is an arm of the state. Those factors include:

> (1) Whether the entity is operated with public funds;
>
> (2) Whether the entity's employees are considered government employees;
>
> (3) Whether the entity receives significant assistance from the government by provision of property or equipment; and
>
> (4) Whether the entity is governed by an independent board selected by members of a private organization or a board elected by the voters or appointed by elected officials.

Id. at 572.

In their first amended complaint, the Haases alleged the following:

> 16. At all times...Quest acted as an agent and/or extension of the State by performing a *quasi* governmental function under the ultimate supervision, direction, and control of the Court and/or State....
>
> 38. ...The court and/or State further subjected Plaintiff to discrimination by ...ordering her to be confined in a privately operated system [Quest].

The district court correctly found that the Haases did not sufficiently plead that the State of Ohio is responsible for Quest's alleged wrongdoing. The first amended complaint is deficient because it does not satisfy our pleading requirements under *Johnson* for imposing liability on the State of Ohio.

C. Whether the State of Ohio is Entitled to Eleventh Amendment Immunity for the Haases' Claim Under Title II of the ADA

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. AMEND. XI. It is well established that "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) (internal citation omitted). "[I]n the absence of consent a suit in which the State or one of

its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." *Id.* Eleventh Amendment immunity does not however, apply in two circumstances: (1) where a state has waived its immunity from suit in federal court, and (2) where Congress has abrogated the state's immunity. *Thiokol Corp. v. Dep't of Treas., State of Mich., Revenue Div.*, 987 F.2d 376, 381 (6th Cir. 1993). The Haases argue that Congress abrogated the State of Ohio's immunity to claims arising under Title II of the ADA.

In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), the Supreme Court held that Congress can abrogate a State's sovereign immunity when it does so pursuant to a valid exercise of its power under §5 of the Fourteenth Amendment. The most recent Supreme Court case to address Eleventh Amendment Immunity for ADA Title II claims is *Tennessee v. Lane*, 541 U.S. 509 (2004). In *Lane*, the Supreme Court held that Title II of the ADA is a valid exercise of Congress's §5 authority to protect a plaintiff's due process right of access to the courts. *Id.* at 531. The Supreme Court made clear, however, that its holding in *Lane* was expressly limited to the question before it: whether Congress had the power under § 5 of the Fourteenth Amendment to enforce the constitutional right of access to the courts:

> [N]othing in our case law requires us to consider Title II, with its wide variety of applications, as an undifferentiated whole. Whatever might be said about Title II's other applications, the question presented in this case is not whether Congress can validly subject the States to

> private suits for money damages for failing to provide reasonable access to hockey rinks, or even to voting booths...

Id. at 530-31. Accordingly, the holding in *Lane* is limited and does not provide us with guidance for this case because the circumstances presented in *Lane* (*i.e.*, access to the courts) are not present in this case. Thus, we must look to precedent from this circuit to resolve the question before us.

In *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002), a state court failed to provide the plaintiff with adequate hearing assistance during a child custody case. We held, in an *en banc* decision, that the Eleventh Amendment barred claims under Title II of the ADA based upon the Equal Protection Clause but did not bar such claims sounding in due process. *Id.* at 812. The Haases concede on appeal, as they emphasized before the district court, that their claims implicate equal protection concerns, not those of due process: "This Court should now take this opportunity to hold that Title II of the ADA has abrogated Eleventh Amendment immunity even with respect to pure claims of disparate treatment that sound solely in equal protection."

Despite our holding in *Popovich* that the Eleventh Amendment bars equal protection claims under Title II of the ADA, the Haases ask us to clarify our ruling in light of the Supreme Court's decision in *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003). In *Hibbs*, a male state employee sought damages because of alleged violations of the Family Medical Leave Act (FMLA), 29 U.S.C. §2612. *Id.* at

725. The Supreme Court held that Congress intended the FMLA to protect a right guaranteed by the Equal Protection Clause – specifically, the right to be free from gender-based discrimination in the workplace. *Id.* at 728. The Haases say that because the Supreme Court in *Hibbs* determined that Congress validly abrogated Eleventh Amendment immunity based on the principles of equal protection, *Popovich* no longer is persuasive because *Hibbs* suggests that Congress may exercise its §5 authority to adopt legislation imposing purely equal protection-type requirements upon the states. We find this position unavailing, however, because constitutional standards relating to gender-based discrimination (which is what was at issue in *Hibbs*) are distinguishable from those relating to discrimination of the disabled. Notably, gender-based discrimination is entitled to a heightened level of constitutional scrutiny – one that requires a gender-based classification to serve important governmental objectives and be substantially related to the achievement of those objective. *Id.* at 736. Discrimination on the basis of a characteristic such as a disability, on the other hand, is entitled only to a "rational basis" review. *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985). "States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational." *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001).

In light of the narrow scope of *Lane's* holding, which is limited to Title II ADA claims for the right of access to courts, and in light of this circuit's precedent that establishes that the Eleventh Amendment bars

equal protection claims under Title II of the ADA, we find that the district court did not err in holding that the State of Ohio is entitled to Eleventh Amendment immunity for the Haases' claim under Title Ii of the ADA.

IV. CONCLUSION

For the foregoing reasons, the decision of the district court is **AFFIRMED**.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 05-3147

Filed: April 18, 2006

RACHEL HAAS; CAROL HAAS; RICHARD HAAS,)
Plaintiffs-Appellants,

v.

STATE OF OHIO
Defendants-Appellee

MANDATE

Pursuant to the court's disposition that was filed 3/27/06 the mandate for this case hereby issues today.

A True Copy.

COSTS: NONE

Attest:

Filing Fee ..... $
Printing ..... $

Total ..... $

Nancy Baines
Deputy Clerk

City of Canton Ohio. On June 2, 2004, Plaintiffs voluntarily dismissed the City of Canton. Shortly after and on June 11, 2004, Plaintiffs filed an amended complaint. The amended complaint added Ohio as a defendant. In her amended complaint, Plaintiff Rachel Haas generally alleges that Ohio discriminated against her based on alleged physical disabilities by denying access to programs provided to non-disabled individuals.

The amended complaint claims that near September 19, 2002, Rachel Haas suffered various injuries when a truck struck her all terrain vehicle. Following the accident, she underwent extensive medical treatment and physical therapy. The Ohio Highway Patrol cited Rachel Haas for driving under the influence of alcohol at the time of the accident. On February 18, 2003, she pled guilty to the charges against her in Canton Municipal Court. After receiving her guilty plea, Judge Richard Kubilus sentenced Haas to confinement in Quest's drug and alcohol treatment facility in Massillon, Ohio for two six-day periods beginning March 13, 2003 and April 10, 2003.

With their complaint, Plaintiffs say Quest's facility lacked proper accommodations for Rachel Haas' injuries, such as an elevator and disabled-accessible toilets and showers. Plaintiffs allege that Quest personnel were rude and did not approve Rachel Haas' completion of the program.

II. Legal Standard

Ohio moves under Fed. R. Civ. P. 12(b)(1) to dismiss Plaintiffs' claims for lack of subject matter jurisdiction. A Rule 12(b)(1) motion can attack either

the legal or the factual basis for jurisdiction. *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994). In this case, Ohio attacks the legal basis for jurisdiction, saying that it is immune from Plaintiffs' claims under the Eleventh Amendment of the U.S. Constitution. For purposes of deciding this motion, the Court accepts Plaintiffs' allegations as true. *Id.* Although Ohio couches its Eleventh Amendment argument as an alternative basis for dismissal, the Court addresses jurisdictional arguments first.

Ohio separately seeks dismissal under Fed.R.Civ.P.12(b)(6) for failure to sate claim. The Court grants a Rule 12(b)(6) motion when "it is clear that the plaintiff can prove no set of facts in support of [the] claim that would entitle [the plaintiff] to relief." *Miller v. Currie*, 50 F.3d 373, 377 (6th Cir. 1995). In deciding a motion under Rule 12(b)(6), the Court accepts all of the allegations as true and construes the complaint "liberally in favor of the party opposing the motion." *Id.* While the Court accepts all well pleaded allegations as true, the Court does not accept the "bare assertion of legal conclusions." *Columbia Natural Res., Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995). Nor does the Court accept "unwarranted factual inferences." *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987).

The Court will consider only the well-pleaded factual allegations in the amended complaint itself. *Glicker v. Michigan Liquor Control Comm'n*, 160 F.2d 96, 101 (6th Cir. 1947) ("In considering the motion to dismiss we are controlled by the allegations of the Complaint."). The Court does not "take into account additional facts asserted in a memorandum opposing the motion to dismiss, because such memoranda do not

constitute a pleading under Rule 7(a)." 2 MOORE'S FEDERAL PRACTICE § 12.34[2] (3d ed. 2002).

III. Discussion

Plaintiffs' amended complaint sues Ohio under the following causes of action: (1) disability discrimination in violation of Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12132; and (2) violation of the Rehabilitation Act, 29 U.S.C. §794(a). Ohio argues that this Court should dismiss the claims under Rule 12(b)(6) because Plaintiffs fail to state a claim against Ohio. In the alternative, Ohio argues that the Eleventh Amendment gives it immunity from Plaintiffs' claims.

Title II of the ADA states:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. Section 504 of the Rehabilitation Act employs similar language:

> No otherwise qualified individual with a disability in the United States . . . shall, solely, by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C. §794(a). Although the Rehabilitation Act predates the ADA, "analyses of claims made under the two acts run roughly parallel." *Mahon v. Crowell*, 295 F.3d 585, 588-89 (6th Cir. 2002). The primary difference is that the Rehabilitation Act only covers programs or activities that federally-funded entities offer. *McPherson v. Michigan High School Athletics Ass'n*, 119 F.3d 453, 459-60 (6th Cir. 1997). Title II focuses on services, programs, or activities that "public entities" offer, regardless of federal funding.

A. Eleventh Amendment Immunity

Ohio bases its jurisdictional argument on Eleventh Amendment immunity. The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Eleventh Amendment immunity prevents federal courts from exercising jurisdiction over a claim, and bars all suits, whether for injunctive, declaratory or monetary relief, against the state and its departments. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 101-01(1984). Eleventh Amendment immunity extends to suits against a state by that state's own citizens. *S.J. v. Hamilton County*, 374 F.3d 416, 419 (6th Cir. 2004).

The Eleventh Amendment does not apply in two situations: (1) If Congress has abrogated the state's immunity, or (2) If the state has waived its immunity from suit in federal court. *Thiokol Corp. v. DOT*, 987 F.2d 376, 381 (6th Cir. 1993). In response to Ohio's motion, Plaintiffs claim that (1) Congress abrogated

Ohio's immunity to claims arising under Title II of the ADA, and (2) Ohio waived its immunity to Rehabilitation Act claims. The Court finds that Ohio has Eleventh Amendment immunity to Plaintiffs' ADA claim, but not to Plaintiffs' Rehabilitation Act claim.

Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001), provides the starting point for the Eleventh Amendment analysis. In *Garrett*, the Supreme Court held that states are immune to suits for money damages under Title I of the ADA.[1] The Court found that Title I improperly abrogated the states' Eleventh Amendment immunity because it exceeded Congress's authority to enforce the Fourteenth Amendment's Due Process Clause. The Court held that only legislation that responds to a "history and pattern of unconstitutional. . .discrimination by the States" is a valid exercise of Congress's enforcement authority. *Id.* at 368. The remedy imposed "must be congruent and proportional to the targeted violation." *Id.* at 374.

Additionally, the Fourteenth Amendment does not require states to accommodate the disabled if the states' actions have a rational basis. *Id.* at 367. The Supreme Court explained that Title I required accommodation despite whether the states have rational bases for disability-based distinctions. *Id.* at 372-74. As a result, Title I did not validly abrogate Eleventh Amendment immunity.

Although *Garrett* did not address Title II, the

---

[1] Title I of the ADA generally prohibits employers from "discriminating against a qualified individual with a disability . . . in regard to . . . terms, conditions, and privileges of employment." 42 U.S.C. §12112(a).

Sixth Circuit applied *Garrett*'s reasoning to Eleventh Amendment immunity for Title II claims in *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002). There, the plaintiff alleged that the lack of accommodations for his hearing disability prevented him from participating fully in a child custody hearing. The court concluded that Title II exceeded Congress's enforcement authority under the Equal Protection Clause, but also found that Title II may validly abrogate Eleventh Amendment immunity to enforce due process guarantees. In the court's words, Title II's "participation" requirement "serves to protect [the plaintiff's] due process right to a meaningful hearing . . . . " *Id.* at 815-16.

Tennessee v. Lane, --U.S. --, 124 S. Ct. 1978 (2004), is the most recent Supreme Court decision to address immunity for Title II claims. In *Lane*, the Supreme Court established that Title II is a valid exercise of Congress's Fourteenth Amendment enforcement authority to protect a plaintiff's due process right of access to the courts. *Id.* at 1992. In reaching its decision, the Court noted that Congress developed a legislative record documenting exclusion of the disabled from courthouses and court proceedings. *Id.* at 1990.

The Court further noted that Title II extends beyond the employment discrimination that Title I targets, seeking "to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review." *Id.* at 1988. Those constitutional guarantees include (1) the right of access to the courts, (2) the right of a criminal defendant "to be present at all stages of a trial where his absence might frustrate the fairness of the

proceedings," (3) the right of certain civil litigants to "a meaningful opportunity to be heard," (4) the right of criminal defendants to a trial by jury, and (5) the public's First Amendment right of access to criminal proceedings. *Id.* (citations omitted).

The Supreme Court concluded that Title II was a congruent and proportional response to the documented infringement of access to the courts. *Id.* at 1993-94. The Supreme Court made clear that the decision only addressed the right of access to the courts, and not any other application of Title II: "[N]othing in our case law requires us to consider Title II, with its wide variety of applications, as an undifferentiated whole." *Id.* at 1993.

The Court knows of no cases from the Sixth Circuit or any other circuit that apply *Lane* under the circumstances presented here. The lone case from the Sixth Circuit does not address this issue. *See S.J. v. Hamilton County*, 374 F.3d 416, 421-22 (6th Cir. 2004) (applying *Lane* outside Title II context to help determine whether local government is an arm of the state for purposes of Eleventh Amendment immunity).

Nor do the cases from other circuits provide much guidance on applying *Lane* to these circumstances. *See Badillo-Santiago v. Naveira-Merly*, 378 F.3d 1 (1st Cir. 2004) (vacating dismissal of plaintiff's Title II claim that "during his trial he was denied due process because there was no reasonable accommodation for his hearing impairment"); *Roe v. Johnson*, No.03-CIV-8501, 2004 U.S. Dist. LEXIS 17483, at *14 (S.D. N.Y. Aug. 31, 2004) (granting motion to dismiss Title II claim that state bar association denied plaintiff's application based on

disabilities); *Douris v. Bucks County Office of the DA*, No. 03-CV-5661, 2004 U.S. Dist. LEXIS 12769, at *13 (E.D. Pa. July 6, 2004) (noting that inmate's Title II claim was "problematic," but granting defendants' motion for summary judgment on other grounds); *McNulty v. Board of Educ.*, Civ. No. 2003-2520, 2004 U.S. Dist. LEXIS 12680, at *9 (D. Md. July 8, 2004) (granting motion to dismiss; finding that "Eleventh Amendment immunity remains intact for education claims under Title II of the ADA"); *Solley v. Big Spring State Hosp.*, No. 1:03-CV-094-C,

2004 U.S. Dist. LEXIS 12958, at *13 (N.D. Tex. July 12, 2004) (granting defendant's motion for partial summary judgment; finding that the Eleventh Amendment bars money damages claims for Family and Medical Leave Act violations).

Some cases merit further attention. In *Carrasquillo v. City of New York*, 324 F. Supp. 2d 428, 442 (S.D. N.Y. 2004), the Southern District of New York held that an inmate's Title II claim against the city of New York was actionable under *Lane*. The inmate had difficulty walking because of injuries he sustained in an automobile accident. The inmate alleged that the city violated Title II by placing him "in housing that was far from such prison services as the law library and infirmary, thus forcing Plaintiff to walk great distances to use these facilities and causing him great pain due to his medical condition." *Id.* at 441.

In finding that Eleventh Amendment immunity did not apply, the court interpreted *Lane* as "upholding [the] ADA's abrogation of a State's Eleventh Amendment immunity . . . ." *Id.* at 442. That

interpretation exceeds the scope of the Supreme Court's opinion. *Lane* does not say that the ADA abrogated Eleventh Amendment immunity entirely. Instead, the Supreme Court held only that Title II abrogated Eleventh Amendment immunity for claims implicating the "constitutional right of access to the courts." *Lane*, 124 S. Ct. at 1993. *Carrasquillo* does not persuade this Court.

Nor does the Western District of Wisconsin's decision in *Flakes v. Frank*, 322 F. Supp. 2d 981 (W.D. Wis. 2004). In *Flakes*, the court reconsidered its previous decision denying an inmate's request to proceed with Title II claims against the Secretary of Wisconsin's Department of Corrections. The inmate alleged that the defendant violated Title II by failing to provide various medical services and assistance. *Flakes v. Frank*, No. 04-C189-C, 2004 U.S. Dist. LEXIS 7650, at *11-12 (W.D. Wis. Apr. 30, 2004). The court initially dismissed the inmate's Title II claims based on Seventh Circuit precedent that the ADA did not abrogate Eleventh Amendment immunity with respect to Title I (not Title II) claims. *Flakes*, 322 F. Supp. 2d at 982-83. After *Lane*, the court held that "[a]lthough it may be that in the final analysis, I will conclude that [*Lane*]'s narrow scope does not encompass plaintiff's ADA claims, at this stage of the proceedings I cannot say that plaintiff could prove no set of facts entitling him to relief on his ADA claims." *Id.*

Unlike *Flakes*, this Court relies on both *Lane* and Sixth Circuit precedent that squarely addresses Eleventh Amendment immunity for Title II claims and limits abrogation to Title II claims implicating due process rights. *See Popovich*, 276 F.3d at 811.

Popovich is consistent with *Lane*'s finding that Title II abrogates Eleventh Amendment immunity to the extent that Title II claims are based on the due process right of access to the courts.

Finally, the Court notes the Ninth Circuit's opinion in *Phiffer v. Columbia River Corr. Inst.*, No. 01-35984, 2004 U.S. App. LEXIS 19152 (9th Cir. Sept. 13, 2004). There, the Ninth Circuit found that its pre-*Lane* decision that Title II entirely abrogates Eleventh Amendment immunity was consistent with *Lane*. The Ninth Circuit based its opinion on pre-*Lane* precedent that Title II abrogated immunity if the claims sound in due process *or* equal protection. *Id.* at*2-4. Because the Ninth Circuit applies a different analysis than the Sixth Circuit precedent that guides this Court, *Phiffer* is not instructive.

In light of *Garrett*, *Popovich*, and *Lane*, the Court finds that Ohio has Eleventh Amendment immunity to Plaintiffs' Title II claims. Plaintiffs' ADA claims against Ohio sound in equal protection, not due process. "[A] Title II claim sounds in due process and abrogates sovereign immunity where the plaintiff alleges that he was excluded from participating in a proceeding guaranteed to him by the Due Process Clause on the basis of his disability." *Robinson v. University of Akron Sch. of Law*, 307 F.3d 409, 413 (6th Cir. 2002).

In their brief, Plaintiffs contend that Ohio violated Title II by (1) sending Plaintiff Rachel Haas to a drug and alcohol treatment facility that did not accommodate persons with disabilities, and (2) failing to provide accommodations for the disabled at the allegedly state-owned building that Quest uses. [Doc.

43 at 11-14]. Plaintiffs do not allege that Ohio denied Rachel Haas any due process protections because of her disability. Plaintiffs' claims against Ohio are essentially that Rachel Haas was treated differently from non-disabled individuals: "[S]he did not receive the same favorable alternative to incarceration as her non-handicapped counterparts." [Doc. 43 at 13]. As such, Plaintiffs' claims sound in equal protection, not due process.

The Court notes that *Lane* expressly limited its abrogation of Eleventh Amendment immunity to Title II claims regarding "the constitutional right of access to the courts." 124 S. Ct. at 1993. The Supreme Court identified other fundamental rights violations that could properly fall within the scope of Title II claims. Plaintiffs' claims do not fit those other categories. Plaintiffs' claims against Ohio do not implicate the right of access to the courts, the right to be present at a trial, the right to a meaningful opportunity to be heard, the right to a trial by jury, or the public's right of access to criminal proceedings. *Id.* at 1988. Plaintiffs' claims against Ohio sound in equal protection, not due process. The Court holds that Title II does not abrogate Ohio's Eleventh Amendment immunity to Plaintiffs' ADA claims.

Although courts generally apply the same analysis to claims under the ADA and the Rehabilitation Act, Eleventh Amendment immunity presents an exception. In the Sixth Circuit, it is well-settled that the states waive their Eleventh Amendment immunity to Rehabilitation Act claims by accepting federal funds. *See, e.g., Nihiser v. Ohio EPA*, 269 F.3d 626, 628 (6th Cir. 2001) (citing 42 U.S.C. §2000d-7). Plaintiffs allege that Ohio accepts

federal funds. ¶ 41.[2] Viewing the facts in the light most favorable to Plaintiffs, the Court finds that Ohio waived its immunity to Rehabilitation Act claims.

B. Failure To State A Claim

Plaintiffs contend that Ohio violated the ADA and the Rehabilitation Act by denying Rachel Haas access to and participation in services, programs, and activities that Ohio furnished to non-disabled individuals. Ohio says that based on the amended complaint's allegations, Quest is a private agency and is not under Ohio's control. Although the Court agrees that Plaintiffs fail to state a claim against Ohio under the ADA and the Rehabilitation Act for direct disability discrimination, Plaintiffs' Rehabilitation Act claim regarding Ohio's duties as a property owner survives.

To state a claim of disability discrimination under Title II of the ADA, a plaintiff must allege that "(1) she has a disability; (2)she is otherwise qualified; and (3) she is being excluded from participation in, being denied the benefits of, or being subjected to discrimination under the program solely because of her disability." *Jones v. City of Monroe*, 341 F.3d 474, 477 (6th Cir. 2003). A plaintiff must allege the same elements to state a claim under the Rehabilitation Act. *Mahon*, 295 F.3d at 589. For purposes of Ohio's Rule 12(b)(6) motion, there are no relevant differences between Title II of the ADA and Section 504 of the Rehabilitation Act. A separate analysis of the Rehabilitation Act claim is unnecessary. *See Jones*,

---

[2] Paragraph references are to the amended complaint, [Doc. 25].

341 F.3d at 477 n.3.

Plaintiffs satisfy the first and second elements by alleging that Rachel Haas was a qualified individual with a disability. Ohio does not challenge this allegation.

To satisfy the third element, Plaintiffs must sufficiently allege that Ohio's actions caused Rachel Haas to be excluded from participation in, denied the benefits of, or discriminated against under the Quest program because of her disability. Plaintiffs offer two core allegations. [Doc. 43 at 11-14]. First, Ohio committed "direct disability discrimination" when Judge Kubilus ordered Rachel Haas to confinement in a private facility that lacked accommodations for the disabled. Second, Ohio did not meet its obligations as the owner of the property used by Quest. Ohio responds that Plaintiffs have not linked the alleged discrimination by Quest personnel to the state.

Plaintiffs' "direct disability discrimination" claim does not pass muster. Plaintiffs allege that Judge Kubilus understood the extent of Rachel Haas' injuries when he sentenced her to confinement at Quest's facility, and that the Quest program "offered numerous advantages to the participants over the local jails." ¶¶ 12, 13, 37. Plaintiffs do not sufficiently allege that Ohio denied Rachel Haas access to any of the services that Quest offers to program participants. She met with program counselors and participated actively. ¶ 26. Quest's staff delivered food to her room when she had difficulty getting to the dining facility. ¶ 25. Although the staff allegedly forgot to deliver the food "on several occasions," Plaintiffs do not allege that this resulted from discrimination. *Id.*

To the extent Rachel Haas experienced hardships at the Quest facility, Plaintiffs do not allege that those difficulties resulted from discrimination by the state. Although Haas says that Quest's staff "was rude and abusive," Plaintiffs do not allege that Ohio directed Quest's staff to act in such a manner. ¶ 21. Nor do Plaintiffs allege that Ohio directed Quest personnel to impede Rachel Haas' access to physical therapy and pain medication. Although Plaintiffs allege that Ohio owned the building that housed the program, they describe Quest as a "private facility." ¶ 33. None of these allegations imply disability discrimination by Ohio. Plaintiffs have not sufficiently pled that Ohio is responsible for Quest's alleged wrongdoing.[3]

---

[3] In *Johnson v. City of Saline*, 151 F.3d 564 (6th Cir. 1998), the Sixth Circuit identified four factors it will consider in the Title II context to determine whether to view a facility as an arm of the state:

> 1) Whether the entity is operated with public funds;
> 2) Whether the entity's employees are considered government employees;
> 3) Whether the entity receives significant assistance from the government by provision of property or equipment; and
> 4) Whether the entity is governed by an independent board selected by members of a private organization or a board elected by the voters or appointed by elected officials.

Id. at 572. At most, Plaintiffs allege that Ohio assisted Quest by providing access to the state-owned building. Plaintiffs offer no allegations regarding the status of Quest's employees, Quest's sources of funding, or the composition of Quest's board of directors.

Even if Plaintiffs sufficiently alleged their "direct disability discrimination" claim against Ohio, they still would have no claim. Plaintiffs contend that the amended complaint "charges an instrumentality of the State with directly violating both the ADA and the Rehabilitation Act." [Doc. 43 at 12] (emphasis in original). Plaintiffs identify Judge Kubilus as the "instrumentality" in question. *Id.* In Plaintiffs' words, "Judge Kubilus was unconcerned with whether Plaintiff was being required to attend a program that was unable to accommodate her readily observable disabilities." *Id.*

Judge Kubilus has judicial immunity for his sentencing decision. "A judge performing his judicial functions is absolutely immune from suit seeking monetary damages." *Johnson v. Turner*, 125 F.3d 324, 333 (6th Cir. 1997). "Immunity is available even if a judge acts erroneously, corruptly, or in excess of his jurisdiction." *Id.* Plaintiffs' dissatisfaction with Judge Kubilus's decision does not provide a cause of action against Ohio. *See Saint-Fleur v. City of New York*, No. 99-CIV-10433, 2000 U.S. Dist. LEXIS 8814, at *18 (S.D. N.Y. Mar. 14, 2000) ("To the extent that [the plaintiffs] claim against the State is, in reality, an attempt to sue state court judges for damages, his claims are barred."). Plaintiffs fail to state a claim against Ohio for direct disability discrimination under the ADA and the Rehabilitation Act.

Plaintiffs fare better on their claim regarding Ohio's obligations as the owner of the property. Plaintiffs allege that Ohio owns the Quest facility. ¶ 14. In *Johnson v. City of Saline*, 151 F.3d 564, 571 (6th Cir. 1998), the Sixth Circuit addressed the obligations of property owners under Title II and the

Rehabilitation Act and held that "public entities have a duty to provide accessible facilities even when those facilities are used by contractors." As in *Johnson*, "[Ohio] definitely is a landlord, required by Title II to reasonably accommodate the disabled public." *Id.* at 572.

At this stage, the Court cannot rule as a matter of law that Ohio met its obligations as owner of the property. The Court notes that the accessibility requirements are "subject to the bounds of reasonableness." *Id.* at 571. After the completion of discovery, Ohio may very well come forward with evidence that it has taken reasonable steps to provide disabled access to the facility, or that "making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. §35.130(b)(7). Because Ohio has Eleventh Amendment immunity to Plaintiffs' ADA claims, only the Rehabilitation Act claim on this issue survives.

C. Leave To Amend

Plaintiffs request leave to file another amended complaint. Plaintiffs have already filed two complaints in this action. The dispositive discovery deadline is September 23, 2004. The dispositive motion deadline is September 30, 2004. Under these circumstances, the Court finds that Plaintiffs' request is untimely and would impose undue hardship on the other parties. *See Head v. Jellico Housing Auth.*, 870 F.2d 1117, 1124 (6th Cir. 1989). Additionally, amendment would not cure the legal flaws of the dismissed claims.

IV. Conclusion

For these reasons, this Court dismisses Plaintiffs' ADA claims against Defendant Ohio in their entirety under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). The Court also dismisses Plaintiffs' Rehabilitation Act claim against Ohio for direct disability discrimination under Rule 12(b)(6). Plaintiffs' Rehabilitation Act claim against Ohio for failure to comply with disabled accessibility requirements may proceed. The Court denies Plaintiffs' request for leave to amend.

IT IS SO ORDERED.

Dated: September 20, 2004

s/ James S. Gwin
JAMES S. GWIN
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

RACHEL HAAS 8344 Chapel Street Waynesburg, Ohio 44688 and	CASE NO. JUDGE COMPLAINT
CAROL HAAS 8344 Chapel Street Waynesburg, Ohio 44688 and	[JURY DEMAND ENDORSED HEREON]
RICHARD HAAS 8344 Chapel Street Waynesburg, Ohio 44688	DIVISION CASE NO. 5:04CV0409
Plaintiffs, vs.	
QUEST RECOVERY SERVICES, INC. 1341 Market Ave., North Canton, Ohio 44714-2675 and	
CITY OF CANTON c/o Department of Law City Hall – 7th Floor 218 Cleveland Ave., S.W. Canton, Ohio 44701	
Defendants.	

COMPLAINT

Plaintiffs, Rachel Haas, Carol Haas, and Richard Haas, hereby state as their Complaint against Defendants, Quest Recovery Services, Inc. (hereinafter "Quest") and the City of Canton (hereinafter the "City"), as follows:

PARTIES

1. At all times herein relevant, Plaintiffs were and are residents of Stark County, Ohio.

2. At all times herein relevant, Quest was and is a corporation formed under Ohio law. *Charter No. RN203064.* Quest has maintained a presence and provided services in Stark County and elsewhere in the State of Ohio.

3. At all times herein relevant, the City was and is a political subdivision organized under Ohio law and capable of suing and being sued.

JURISDICTION AND VENUE

4. Jurisdiction over the controversy described herein properly lies in this Court as several of Plaintiffs' claims arise under the laws of the United States. *28 U.S.C. §1331* (Federal Question). Additionally, Plaintiffs are seeking relief for the violation of their federal civil rights. *28 U.S.C. §1343* (Civil Rights and Elective Franchise).

5. Venue is appropriate in this Court as the parties reside and a substantial part of the events and circumstances giving rise to Plaintiffs' claims occurred within this judicial district. *28 U.S.C. §1391* (Venue Generally).

BACKGROUND

6. On or about September 19, 2002, Plaintiff, Rachel Haas, was operating a 4-wheel all terrain vehicle in Louisville, Ohio. She was twenty-four (24) years old at the time.

7. As she was crossing Meese Road, Plaintiff was struck by a truck and thrown from her vehicle. Plaintiff sustained life-threatening injuries in the collision, including multiple fractures to her pelvis, compound fractures in both arms, a partially severed left hand, a crushed left leg, broken teeth, and substantial internal damage.

8. Plaintiff was transported to Aultman Hospital and underwent emergency surgery. Over the course of the next several weeks, her physicians performed numerous procedures including the amputation of her left leg above the knee and reattachment of her left hand. Various types of hardware were also implanted in Plaintiff, such as a prosthetic right elbow and a metal rod in her right arm.

9. Plaintiff was confined to Aultman Hospital for approximately four (4) weeks. Once she was released, she was prescribed narcotics to relieve her pain and numerous other medications. She then began a rigorous full-time course of physical therapy and rehabilitation.

10. Plaintiff was charged by the Ohio State Highway Patrol with driving under the influence of alcohol in connection with her accident. *O.R.C. §4511.19(A)(1) & (2).* The case was assigned to Judge Richard Joseph Kubilus of the City's Municipal Court.

Case No. 2002 TRC 10088.

11. On February 18, 2003, Plaintiff entered a plea of guilty to the charge against her. Plaintiff was then sentenced accordingly by Judge Kubilus.

12. In a further order issued on February 26, 2003, Judge Kubilus directed that Plaintiff was to be confined for two (2) six-day periods at Quest's facility in Massillon, Ohio. Notwithstanding her physical impairments, she was directed to begin the first session on March 13, 2003.

13. At all times thereafter, Quest acted as an agent and/or extension of the City by performing a *quasi*-municipal function under the City's ultimate supervision, direction, and control.

14. Plaintiff reported to the Quest facility on March 13, 2003 as directed. At that stage in her recovery she was still confined to a wheelchair and had trouble performing many basic functions such as standing, walking, using the bathroom, or lifting or manipulating objects. Plaintiff was still taking narcotic pain pills and other medications, as prescribed by her physicians.

15. Plaintiff was instructed by a Quest employee upon her arrival to proceed with her luggage to the sixth floor of the building. When she asked where the elevator was located, she was told there was none and she would need to use the stairs. The Quest employee refused to provide any assistance to her. With her parents' help, Plaintiff was therefore forced to "scoot" herself up six (6) flights of stairs. In addition to substantial physical pain, cramping, and discomfort, Plaintiff also suffered substantial embarrassment and

humiliation as numerous other inmates and Quest staff members climbed the stairs past her.

16. Initially, Quest's staff would only serve her meals in the basement. Plaintiff was thus required to hop, scoot, and crawl up and down the steps without any assistance several times a day. Since she could not bring her wheelchair to the basement, she was forced to hop substantial distances in order to get her food and reach the table. These journeys were extremely painful and embarrassing for Plaintiff.

17. Plaintiff's wheelchair would not fit into the restroom she was required to use, which was not handicap-accessible. Plaintiff had to sit on the floor of the co-ed shower in order to bathe herself. Plaintiff also experienced substantial difficulty utilizing the non-handicap accessible toilets, which was greatly complicated by her internal injuries and the medications she was taking.

18. Quest's staff refused to offer any special assistance to her and was rude and abusive. They frequently subjected Plaintiff to disparate treatment. For example, Quest's staff berated her about the oxycotin medication that had been prescribed to her and insinuated on several occasions that she was a drug addict. They subjected her to humiliating monitoring when she took the pills. On many occasions, Quest employees resisted providing her with the medication she required.

19. Plaintiff's understanding had been that arrangements had been made with Judge Kubulis to permit her to attend her daily physical therapy treatments during her confinement. On the second

day, Quest's staff refused to allow her to leave for her appointment. Plaintiff immediately became alarmed and upset that her recovery from the accident would be impaired. She had been warned by her health care providers that she could lose her right arm if she did not adhere to her physical therapy regime. It was not until the next day that Quest finally acquiesced to allowing Plaintiff to leave the premises for her treatments.

20. On or about March 16, 2003, Plaintiff slipped and fell as she was hopping up the steps at Quest's facility. She tumbled down three (3) stairs, displacing the rod in her right arm in the process. Plaintiff suffered unbearable pain as a result of the fall and again became fearful that her recovery was in jeopardy.

21. The next day, Plaintiff's physical therapist, Rich Guscatitas, P.T., issued a letter confirming that she had not been cleared to climb six (6) flights of steps three (3) times a day. *See Exhibit A, appended hereto.* The therapist further expressed concern that the facility was not handicap accessible. *Id.* He concluded that:

> Once again, the situation does not sound like a disability accessible site and needs to be reconsidered at this time for the patient's best interests and safety.

Id.

22. Plaintiff's treatment by Quest's staff thereafter only became worse. She was advised that she would no longer be required to use the steps and her meals would be brought to her in her room. They

thereafter "forgot" to deliver the food to her on several occasions leaving her without anything to eat.

23. On Plaintiff's fifth day in the facility, she met with the counselor who had been working the most with her. After conducting his assessment, he concluded that Plaintiff had been active and cooperative, had successfully completed the program, and did not need any further alcohol/substance abuse treatment.

24. Shortly thereafter, Plaintiff was directed to report to the Director of the Quest facility. The Director proceeded to tear up the favorable assessment form that had been prepared by the counselor. She then advised Plaintiff that her attitude had been unacceptable and her completion of the program would not be approved. Plaintiff was emotionally devastated as a result.

25. On March 27, 2003, Judge Kubulis issued an order threatening to impose additional sanctions against Plaintiff for failing to complete the Quest program. Quest's Director and at least one (1) staff member appeared for the hearing that was conducted on April 4, 2003 in the City's Municipal Court. At the conclusion of this proceeding, Judge Kubilus ordered Plaintiff to be imprisoned in the Stark County Jail for six (6) days. Although her physical impairments had worsened as a result of her mistreatment by Quest, Plaintiff was ordered to begin her confinement on April 7, 2003.

26. Plaintiff completed her six (6) day incarceration in the Stark County Jail without incident.

27. As a direct and proximate result of the abuse and mistreatment that was inflicted upon her between March 13, 2003 and April 4, 2003, Plaintiff has suffered serious emotional harm and her physical recovery from her accident has been substantially impaired.

COUNT I
HANDICAP DISCRIMINATION

28. Plaintiffs hereby repeat and reallege the foregoing allegations of this pleading as if fully restated herein.

29. Following her accident of September 19, 2002, Plaintiff, Rachel Haas, suffered from a number of physical "disabilities" that substantially limited many of her major life activities within the meaning of *42 U.S.C. §12102(2).* These physical impairments included, but were not limited to, the loss of her left leg below the knee, substantial impairment of both arms and hands, and considerable damage to her pelvis and internal organs.

30. At all times herein relevant, Quest qualified as a "private entity" pursuant to *42 U.S.C. §12181(6)* and was thus subject to Title III of the Americans with Disabilities Act (ADA).

31. At all times herein relevant, the Massillon facility operated by Quest qualified as a place of "public accommodation" within the meaning of *42 U.S.C. §12181(7)* and was thus subject to ADA Title III.

32. In the manner aforementioned, Quest violated ADA Title III by discriminating against Plaintiff on the basis of her disabilities and effectively

depriving her of the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of the Massillon facility. *42 U.S.C. §12182(a).* Quest's disparate treatment of Plaintiff included (but was not limited to) failing to accommodate her physical handicaps by making the building and structures readily accessible to her or providing her with the assistance she required to complete the program. Unlike the other inmates at the facility, Plaintiff was abused and mistreated by Quest's staff as a result of her inability to comply with their unreasonable expectations.

33. At all times herein relevant, the City was a "public entity" as defined by *42 U.S.C. §12131(1)* and was thus subject to ADA Title II.

34. At the time of Plaintiff's conviction and sentencing, the City was directing certain individuals, through its Municipal Court system, to participate in programs and activities such as that being operated by Quest in lieu of actual incarceration. Such privately operated programs and activities offered numerous advantages to the participants over the local jails.

35. In the manner aforementioned, the City violated ADA Title II by failing to ensure that Plaintiff was able to participate in and benefit from the services, programs, and activities that were being furnished to non-handicapped individuals. The City further subjected Plaintiff to discrimination by, for example purposes only, ordering her to be confined in a privately operated system that was not handicap accessible and was being operated by untrained and unqualified staff members.

36. In accordance with *42 U.S.C. §12133* and

29 U.S.C. §794, Plaintiff is entitled to compensation from Defendants to the fullest extent permitted by law for the damages and losses she has suffered, and will continue to suffer, as described herein as well as appropriate injunctive relief. As permitted by *42 U.S.C. §12188* and *42 U.S.C. §2000a-3(a)*, appropriate injunction relief should further be imposed against Quest to preclude all further violations of ADA Title III.

COUNT II
REHABILITATION ACT

37. Plaintiffs hereby repeat and reallege the foregoing allegations of this pleading as if fully restated herein.

38. Plaintiff reasonably believes, and therefore alleges, that the programs and activities provided by Quest and/or the City as described herein received federal financial assistance, directly or indirectly, and thus were subject to the Rehabilitation Act. *29 U.S.C. §794(a).*

39. As a consequence of the substantial physical impairments she was suffering that precluded her from performing many usual life activities, Plaintiff was a "qualified individual with a disability" within the meaning of *29 U.S.C. §794(a)* throughout her dealings and interactions with Defendants.

40. In the manner aforementioned, Defendants discriminated against Plaintiff by denying her the full access to, participation in, and the benefits of the programs and activities that were being provided to non-handicapped individuals. *29 U.S.C. §794(a).* This disparate treatment was imposed upon

Plaintiff because of her disabilities.

41. Plaintiff's handicaps were readily apparent to everyone observing her. Her physical inability to perform most typical life functions was thus known to the employees and agents of Defendants. They nevertheless imposed unreasonable burdens upon her and refused to supply her with the readily available accommodations she required.

42. In the manner aforementioned, the employees and agents of Defendants acted intentionally with respect to their mistreatment of Plaintiff and displayed a deliberate indifference to her needs and legal rights as a handicapped individual.

43. Plaintiff is entitled to full compensation for the damages and losses she has suffered, and will continue to suffer, as a direct and proximate result of the violations of *29 U.S.C. §794(a)* by Defendants.

COUNT III
CIVIL RIGHTS VIOLATIONS

44. Plaintiffs hereby repeat and reallege the foregoing allegations of this pleading as if fully restated herein.

45. At all times herein relevant, Plaintiff was a citizen of the United States and thus entitled to the full benefits and equal protection of the federal constitutional and all laws and regulations enacted thereunder.

46. In the manner aforementioned, Defendants and their officials, employees, agents, and representatives were acting at all times under the color of the statutes, ordinances, regulations, customs, and usage of the State of Ohio, County of Stark, and

City of Canton. Quest, in particular, served as an instrumentality of the City in providing what was essentially a municipal service at the City's request and under the City's ultimate control.

47. In the manner aforementioned, Defendants knowingly and purposefully deprived Plaintiff of her clearly established rights, privileges, and immunities as secured by the Constitution and laws of the United States in violation of *42 U.S.C. §1983*. These clearly established rights included, but were not limited to, those afforded under the Eighth Amendment (Cruel and Unusual Punishment) and Fourteenth Amendment (Due Process and Equal Protection). As alleged in Count I and II of this Complaint, Plaintiff was further denied her rights under the federal ADA and Rehabilitation Act.

48. Defendants' officials, employees, agents, and representatives knew, or should have known, that their acts and omissions as herein described were prohibited under federal law.

49. At all times herein relevant, Plaintiff was treated in accordance with the procedures, practices, and policies that had been established and approved by the City's duly authorized officials and policymakers.

50. As a direct and proximate result of Defendants' interference with Plaintiff's federal constitutional and statutory rights, she has suffered substantial damages and losses, which are expected to be ongoing.

COUNT IV
NEGLIGENCE/INTENTIONAL TORT

51. Plaintiffs hereby repeat and reallege the foregoing allegations of this pleading as if fully restated herein.

52. At all times herein relevant, Defendants were subject to a common law duty that required them to afford due care to Plaintiff and make reasonable accommodations for her safety.

53. Because Plaintiff's presence on Quest's property conferred direct and/or indirect benefits upon the owner and/or occupier of the premises, she qualified as a "business invitee" and was entitled to a heightened duty of protection.

54. Defendants' legal responsibilities to Plaintiff were further established in various laws and regulations applicable to them, including those pertaining to accommodations for the handicapped and other safety standards.

55. Through no fault of Plaintiff, Defendants carelessly and unjustifiably failed to abide by the aforementioned duties that were owed to her. Defendants' negligence and negligence *per se* included, but was not limited to, failing to:

a. provide handicap-accessible facilities;
b. furnish a safe means of travel between floors;
c. hire and properly train staff members to accommodate handicapped individuals;
d. remove hazards posed to handicapped individuals;

e. warn Plaintiff of dangers posed to her; and

f. establish effective procedures to allow residents to receive the medical care, rehabilitation services, and medicine they required.

56. In the manner aforementioned, Defendants' negligence and negligence *per se* was committed in connection with physical defects existing within grounds and/or buildings that were used in connection with the performance of proprietary and/or governmental functions within the meaning of *O.R.C. §2744.02(B)(4).*

57. Defendants knew, or in the exercise of due care should have known, that they were jeopardizing Plaintiff's health and safety by failing to abide by the aforementioned duties, standards and regulations. Defendants thus acted with a deliberate indifference to Plaintiff's rights and safety and in a manner that posed a great risk of harm to her.

58. As a direct and proximate result of Defendants' negligent, reckless, and/or malicious wrongdoing as aforementioned, Plaintiff has sustained severe physical injuries, required substantial medical treatment, suffered an impairment of her earning capacity, endured great pain, anxiety, and distress, and has been prevented from performing many usual activities. Plaintiff reasonably believes, and therefore alleges, that these losses will be ongoing.

COUNT V
INFLICTION OF EMOTIONAL DISTRESS

59. Plaintiffs hereby repeat and reallege the

foregoing allegations of this pleading as if fully restated herein.

60. In the manner aforementioned, Quest's employees, agents, and representatives acted in an extreme and outrageous manner which they knew, or reasonably should have known, would cause Plaintiff to suffer extreme embarrassment, distress, and anxiety. They nevertheless took such actions with a conscience disregard of Plaintiff's rights and safety.

61. The stress, anxiety, and embarrassment that were inflicted upon Plaintiff went well beyond the bounds of human decency and were more than any reasonable person with her physical disabilities could be expected to endure.

62. As a direct and proximate result of the intentional acts and omission of Quest's employees, agents, and representatives as aforementioned, Plaintiff has endured severe and debilitating emotional harm. Plaintiff reasonably believes, and therefore alleges, that her suffering in this regard will be ongoing.

COUNT VI
LOSS OF CONSORTIUM

63. Plaintiffs hereby repeat and reallege the foregoing allegations of this pleading as if fully restated herein.

64. Plaintiffs, Carol and Richard Haas, are the natural parents of Plaintiff, Rachel Haas.

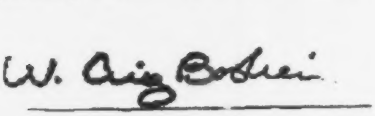
65. As a direct and proximate result of the acts and omissions of Defendants as herein described, Plaintiffs, Carol and Richard Haas, have been denied the companionship, support, and consortium of their

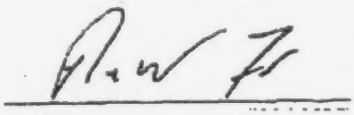
daughter. Plaintiffs have further been required to devote considerable time and effort to assist her with her recovery from the damages and losses herein described. Plaintiffs reasonably believe, and therefore allege, that these losses will be ongoing.

PRAYER

WHEREFORE, Plaintiffs demand judgment against Defendants, jointly and severally, for compensatory damages of ONE MILLION DOLLARS ($1,000,000.00). Plaintiffs further request that punitive damages be imposed against Defendant, Quest Recovery Services, Inc., in the amount of FIVE MILLION DOLLARS ($5,000,000.00). Additionally, this Court should assess Defendants, jointly and severally, with reasonable attorney fees and litigation expenses, pre-judgment interest, costs of this action, and any other legal, equitable, or declaratory relief deemed appropriate. Trial by jury is hereby requested upon all issues.

Respectfully Submitted.





W. Craig Bashein, Esq.
(#0034591)
BASHEIN & BASHEIN CO., L.P.A.
1200 Illuminating Building
55 Public Square
Cleveland, Ohio 44113
(216) 771-3239
FAX (216) 589-0764
cbashein@basheinlaw.com

Paul W. Flowers, Esq.
(#0046625)
PAUL W. FLOWERS CO., L.P.A.
55 Public Square, Ste. 1200
Cleveland, Ohio 44113-1937
(216) 344-9393
FAX: (216) 589-0764
pwf@pwfco.com

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

RACHEL HAAS, *et al.*	CASE NO. 5:04cv00409
Plaintiffs,	JUDGE JAMES S. GWIN
vs.	FIRST AMENDED COMPLAINT
QUEST RECOVERY SERVICES, INC.	[JURY DEMAND ENDORSED HEREON]
Defendant.	
and	
STATE OF OHIO c/o James Petro, Attorney General 30 E. Broad St., 17th Floor Columbus, Ohio 43215-3428	
New Party Defendants.	

FIRST AMENDED COMPLAINT

Plaintiffs, Rachel Haas, Carol Haas, and Richard Haas, hereby state as their First Amended Complaint against Defendant, Quest Recovery Services, Inc. (hereinafter "Quest") and New Party Defendants, and the State of Ohio (hereinafter the "State"), as follows:

PARTIES

1. At all times herein relevant, Plaintiffs were and are residents of Stark County, Ohio.

2. At all times herein relevant, Quest was and is a corporation formed under Ohio law. *Charter No. RN203064.* Quest has maintained a presence and provided services in Stark County and elsewhere in the State of Ohio.

3. At all times herein relevant, the State was and is a governmental entity capable of suing and being sued. The State established, funds, and maintains the Canton Municipal Court, whish is an instrumentality thereof.

JURISDICTION AND VENUE

4. Jurisdiction over the controversy described herein properly lies in this Court as several of Plaintiffs' claims arise under the laws of the United States. *28 U.S.C. §1331* (Federal Question). Additionally, Plaintiffs are seeking relief for the violation of their federal civil rights. *28 U.S.C. §1343* (Civil Rights and Elective Franchise).

5. Venue is appropriate in this Court as the parties reside and a substantial part of the events and circumstances giving rise to Plaintiffs' claims occurred within this judicial district. *28 U.S.C. §1391* (Venue Generally).

BACKGROUND

6. On or about September 19, 2002, Plaintiff, Rachel Haas, was operating a 4-wheel all terrain vehicle in Louisville, Ohio. She was twenty-four (24) years old at the time.

7. As she was crossing Meese Road, Plaintiff was struck by a truck and thrown from her vehicle. Plaintiff sustained life-threatening injuries in the collision, including multiple fractures to her pelvis, compound fractures in both arms, a partially severed left hand, a crushed left leg, broken teeth, and substantial internal damage.

8. Plaintiff was transported to Aultman Hospital and underwent emergency surgery. Over the course of the next several weeks, her physicians performed numerous procedures including the amputation of her left leg above the knee and reattachment of her left hand. Various types of hardware were also implanted in Plaintiff, such as a prosthetic right elbow and a metal rod in her right arm.

9. Plaintiff was confined to Aultman Hospital for approximately four (4) weeks. Once she was released, she was prescribed narcotics to relieve her pain and numerous other medications. She then began a rigorous full-time course of physical therapy and rehabilitation.

10. Plaintiff was charged by the Ohio State Highway Patrol with driving under the influence of alcohol in connection with her accident. *O.R.C. §4511.19(A)(1) & (2).* The case was assigned to Judge Richard Joseph Kubilus of the Canton Municipal Court. *Case No. 2002 TRC 10088.*

11. On February 18, 2003, Plaintiff entered a plea of guilty to the charge against her.

12. Prior to sentencing, the Court had been provided with a letter from Plaintiff's physical

therapist, Rick Gustaitis, dated January 27, 2003, a true and exact copy of which is appended hereto as *Exhibit A.* Therein, he described the nature of Plaintiff's injuries and opined that she would need 3-6 months of continued physical therapy, any disruption of which "would be very detrimental to her progress."

13. In an entry issued on or about February 18, 2003, Judge Kubilus directed that Plaintiff was to be confined for ten (10) days at Quest's facility in Massillon, Ohio (hereinafter the "facility"). Notwithstanding her physical impairments, she was ordered to enter the program by February 28, 2003. *See Exhibit B, appended hereto.*

14. Plaintiff reasonably believes, and therefore alleges, that Quest's facility was constructed, owned, and/or maintained by the State.

15. In a further order issued on February 26, 2003, Plaintiff's sentence was increased to two (2) 6-day periods of confinement which were to commence, respectively, on March 13, 2003 and April 10, 2003.

16. At all times thereafter, Quest acted as an agent and/or extension of the State by performing a *quasi*-governmental function under the ultimate supervision, direction, and control of the Court and/or State.

17. Plaintiff reported to the Quest facility on March 13, 2003 as directed. At that stage in her recovery she was still confined to a wheelchair and had trouble performing many basic functions such as standing, walking, using the bathroom, or lifting or manipulating objects. Plaintiff was still taking narcotic pain pills and other medications, as

prescribed by her physicians.

18. Plaintiff was instructed by a Quest employee upon her arrival to proceed with her luggage to the sixth floor of the building. When she asked where the elevator was located, she was told there was none and she would need to use the stairs. The Quest employee refused to provide any assistance to her. With her parents' help, Plaintiff was therefore forced to "scoot" herself up six (6) flights of stairs. In addition to substantial physical pain, cramping, and discomfort, Plaintiff also suffered substantial embarrassment and humiliation as numerous other inmates and Quest staff members climbed the stairs past her.

19. Initially, Quest's staff would only serve her meals in the basement. Plaintiff was thus required to hop, scoot, and crawl up and down the steps without any assistance several times a day. Since she could not bring her wheelchair to the basement, she was forced to hop substantial distances in order to get her food and reach the table. These journeys were extremely painful and embarrassing for Plaintiff.

20. Plaintiff's wheelchair would not fit into the restroom she was required to use, which was not handicap-accessible. Plaintiff had to sit on the floor of the co-ed shower in order to bathe herself. Plaintiff also experienced substantial difficulty utilizing the non-handicap accessible toilets, which was greatly complicated by her internal injuries and the medications she was taking.

21. Quest's staff refused to offer any special assistance to her and was rude and abusive. They frequently subjected Plaintiff to disparate treatment.

For example, Quest's staff berated her about the oxycotin medication that had been prescribed to her and insinuated on several occasions that she was a drug addict. They subjected her to humiliating monitoring when she took the pills. On many occasions, Quest employees resisted providing her with the medication she required.

22. Plaintiff's understanding had been that arrangements had been made with Judge Kubulis to permit her to attend her daily physical therapy treatments during her confinement. On the second day, Quest's staff refused to allow her to leave for her appointment. Plaintiff immediately became alarmed and upset that her recovery from the accident would be impaired. She had been warned by her health care providers that she could lose her right arm if she did not adhere to her physical therapy regime. It was not until the next day that Quest finally acquiesced to allowing Plaintiff to leave the premises for her treatments.

23. On or about March 16, 2003, Plaintiff slipped and fell as she was hopping up the steps at Quest's facility. She tumbled down three (3) stairs, displacing the rod in her right arm in the process. Plaintiff suffered unbearable pain as a result of the fall and again became fearful that her recovery was in jeopardy.

24. The next day, Plaintiff's physical therapist, Rich Guscatitas, P.T., issued a letter confirming that she had not been cleared ~~to~~ climb six (6) flights of steps three (3) times a day. *See Exhibit C, appended hereto.* The therapist further expressed concern that the facility was not handicap accessible.

Id. He concluded that:

> Once again, the situation does not sound like a disability accessible site and needs to be reconsidered at this time for the patient's best interests and safety.

Id.

25. Plaintiff's treatment by Quest's staff thereafter only became worse. She was advised that she would no longer be required to use the steps and her meals would be brought to her in her room. They thereafter "forgot" to deliver the food to her on several occasions leaving her without anything to eat.

26. On Plaintiff's fifth day in the facility, she met with the counselor who had been working the most with her. After conducting his assessment, he concluded that Plaintiff had been active and cooperative, had successfully completed the program, and did not need any further alcohol/substance abuse treatment.

27. Shortly thereafter, Plaintiff was directed to report to the Director of the Quest facility. The Director proceeded to tear up the favorable assessment form that had been prepared by the counselor. She then advised Plaintiff that her attitude had been unacceptable and her completion of the program would not be approved. Plaintiff was emotionally devastated as a result.

28. On March 27, 2003, Judge Kubulis issued an order threatening to impose additional sanctions against Plaintiff for failing to complete the Quest program. Quest's Director and at least one (1) staff member appeared for the hearing that was conducted

on April 4, 2003 in the Canton Municipal Court. At the conclusion of this proceeding, Judge Kubilus ordered Plaintiff to be imprisoned in the Stark County Jail for six (6) days. Although her physical impairments had worsened as a result of her mistreatment by Quest, Plaintiff was ordered to begin her confinement on April 7, 2003.

29. Plaintiff completed her six (6) day incarceration in the Stark County Jail without incident.

30. As a direct and proximate result of the abuse and mistreatment that was inflicted upon her between March 13, 2003 and April 4, 2003, Plaintiff has suffered serious emotional harm and her physical recovery from her accident has been substantially impaired.

COUNT I
HANDICAP DISCRIMINATION

31. Plaintiffs hereby repeat and reallege the foregoing allegations of this pleading as if fully restated herein.

32. Following her accident of September 19, 2002, Plaintiff, Rachel Haas, suffered from a number of physical "disabilities" that substantially limited many of her major life activities within the meaning of *42 U.S.C. §12102(2).* These physical impairments included, but were not limited to, the loss of her left leg below the knee, substantial impairment of both arms and hands, and considerable damage to her pelvis and internal organs.

33. At all times herein relevant, Quest qualified as a "private entity" pursuant to *42 U.S.C.*

§12181(6) and was thus subject to Title III of the Americans with Disabilities Act (ADA).

34. At all times herein relevant, the Massillon facility operated by Quest qualified as a place of "public accommodation" within the meaning of *42 U.S.C. §12181(7)* and was thus subject to ADA Title III.

35. In the manner aforementioned, Quest violated ADA Title III by discriminating against Plaintiff on the basis of her disabilities and effectively depriving her of the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of the Massillon facility. *42 U.S.C. §12182(a).* Quest's disparate treatment of Plaintiff included (but was not limited to) failing to accommodate her physical handicaps by making the building and structures readily accessible to her or providing her with the assistance she required to complete the program. Unlike the other inmates at the facility, Plaintiff was abused and mistreated by Quest's staff as a result of her inability to comply with their unreasonable expectations.

36. At all times herein relevant, the State is a "public entity" as defined by *42 U.S.C. §12131(1)* and was thus subject to ADA Title II.

37. At the time of Plaintiff's conviction and sentencing, the State was directing certain individuals, through its Municipal Court system, to participate in programs and activities such as that being operated by Quest in lieu of actual incarceration. Such privately operated programs and activities offered numerous advantages to the participants over the local jails.

38. In the manner aforementioned, the Court and/or State violated ADA Title II by failing to ensure that Plaintiff was able to participate in and benefit from the services, programs, and activities that were being furnished to non-handicapped individuals. The Court and/or State further subjected Plaintiff to discrimination by, for example purposes only, ordering her to be confined in a privately operated system that was not handicap accessible and was being operated by untrained and unqualified staff members.

39. In accordance with *42 U.S.C. §12133* and *29 U.S.C. §794*, Plaintiff is entitled to compensation from Defendants to the fullest extent permitted by law for the damages and losses she has suffered, and will continue to suffer, as described herein as well as appropriate injunctive relief. As permitted by *42 U.S.C. §12188* and *42 U.S.C. §2000a-3(a)*, appropriate injunction relief should further be imposed against Quest to preclude all further violations of ADA Title III.

COUNT II
REHABILITATION ACT

40. Plaintiffs hereby repeat and reallege the foregoing allegations of this pleading as if fully restated herein.

41. Plaintiff reasonably believes, and therefore alleges, that the programs and activities provided by Quest and/or the State as described herein received federal financial assistance, directly or indirectly, and thus were subject to the Rehabilitation Act. *29 U.S.C. §794(a).*

42. As a consequence of the substantial

physical impairments she was suffering that precluded her from performing many usual life activities, Plaintiff was a "qualified individual with a disability" within the meaning of *29 U.S.C. §794(a)* throughout her dealings and interactions with Defendants.

43. In the manner aforementioned, Defendants discriminated against Plaintiff by denying her the full access to, participation in, and the benefits of the programs and activities that were being provided to non-handicapped individuals. *29 U.S.C. §794(a).* This disparate treatment was imposed upon Plaintiff because of her disabilities.

44. Plaintiff's handicaps were readily apparent to everyone observing her. Her physical inability to perform most typical life functions was thus known to the employees and agents of Defendants. They nevertheless imposed unreasonable burdens upon her and refused to supply her with the readily available accommodations she required.

45. In the manner aforementioned, the employees and agents of Defendants acted intentionally with respect to their mistreatment of Plaintiff and displayed a deliberate indifference to her needs and legal rights as a handicapped individual.

46. Plaintiff is entitled to full compensation for the damages and losses she has suffered, and will continue to suffer, as a direct and proximate result of the violations of *29 U.S.C. §794(a)* by Defendants.

COUNT III
NEGLIGENCE/INTENTIONAL TORT

47. Plaintiffs hereby repeat and reallege the foregoing allegations of this pleading as if fully restated herein.

48. At all times herein relevant, Quest was and is subject to a common law duty that required it to afford due care to Plaintiff and make reasonable accommodations for her safety.

49. Because Plaintiff's presence on Quest's property conferred direct and/or indirect benefits upon the owner and/or occupier of the premises, she qualified as a "business invitee" and was entitled to a heightened duty of protection.

50. Quest's legal responsibilities to Plaintiff were further established in various laws and regulations applicable to it, including those pertaining to accommodations for the handicapped and other safety standards.

51. Through no fault of Plaintiff, Quest carelessly and unjustifiably failed to abide by the aforementioned duties that were owed to her. Quest's negligence and negligence *per se* included, but was not limited to, failing to:

a. provide handicap-accessible facilities;
b. furnish a safe means of travel between floors;
c. hire and properly train staff members to accommodate handicapped individuals;
d. remove hazards posed to handicapped individuals;
e. warn Plaintiff of dangers posed to her; and

f. establish effective procedures to allow residents to receive the medical care, rehabilitation services, and medicine they required.

52. Quest knew, or in the exercise of due care should have known, that it was jeopardizing Plaintiff's health and safety by failing to abide by the aforementioned duties, standards and regulations. Quest thus acted with a deliberate indifference to Plaintiff's rights and safety and in a manner that posed a great risk of harm to her.

53. As a direct and proximate result of Quest's negligent, reckless, and/or malicious wrongdoing as aforementioned, Plaintiff has sustained severe physical injuries, required substantial medical treatment, suffered an impairment of her earning capacity, endured great pain, anxiety, and distress, and has been prevented from performing many usual activities. Plaintiff reasonably believes, and therefore alleges, that these losses will be ongoing.

COUNT IV
INFLICTION OF EMOTIONAL DISTRESS

54. Plaintiffs hereby repeat and reallege the foregoing allegations of this pleading as if fully restated herein.

55. In the manner aforementioned, Quest's employees, agents, and representatives acted in an extreme and outrageous manner which they knew, or reasonably should have known, would cause Plaintiff to suffer extreme embarrassment, distress, and anxiety. They nevertheless took such actions with a conscience disregard of Plaintiff's rights and safety.

56. The stress, anxiety, and embarrassment that were inflicted upon Plaintiff went well beyond the bounds of human decency and were more than any reasonable person with her physical disabilities could be expected to endure.

57. As a direct and proximate result of the intentional acts and omission of Quest's employees, agents, and representatives as aforementioned, Plaintiff has endured severe and debilitating emotional harm. Plaintiff reasonably believes, and therefore alleges, that her suffering in this regard will be ongoing.

COUNT V
LOSS OF CONSORTIUM

58. Plaintiffs hereby repeat and reallege the foregoing allegations of this pleading as if fully restated herein.

59. Plaintiffs, Carol and Richard Haas, are the natural parents of Plaintiff, Rachel Haas.

60. As a direct and proximate result of the acts and omissions of Quest as herein described, Plaintiffs, Carol and Richard Haas, have been denied the companionship, support, and consortium of their daughter. Plaintiffs have further been required to devote considerable time and effort to assist her with her recovery from the damages and losses herein described. Plaintiffs reasonably believe, and therefore allege, that these losses will be ongoing.

PRAYER

WHEREFORE, Plaintiffs demand judgment against Defendants, jointly and severally, for compensatory damages of ONE MILLION DOLLARS ($1,000,000.00). Plaintiffs further request that punitive damages be imposed against Defendant, Quest Recovery Services, Inc., in the amount of FIVE MILLION DOLLARS ($5,000,000.00). Additionally, this Court should assess Defendants, jointly and severally, with reasonable attorney fees and litigation expenses, pre-judgment interest, costs of this action, and any other legal, equitable, or declaratory relief deemed appropriate. Trial by jury is hereby requested upon all issues.

Respectfully Submitted,

s/W. Craig Bashein, Esq.
W. Craig Bashein, Esq.
(#0034591)
BASHEIN & BASHEIN CO., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113-2295
(216) 771-3239
FAX (216) 781-5876
cbashein@basheinlaw.com

s/Paul W. Flowers, Esq.
Paul W. Flowers, Esq.
(#0046625)
PAUL W. FLOWERS CO., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113-2216
(216) 344-9393
FAX: (216) 344-9395
pwf@pwfco.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of June, 2004, the foregoing document was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/Paul W. Flowers, Esq.
Paul W. Flowers, Esq., (#0046625)
PAUL W. FLOWERS CO., L.P.A.
Attorney for Plaintiffs

No. 07-1259

In the Supreme Court of the United States

RACHEL HAAS, CAROL HAAS, AND RICHARD HAAS,
PETITIONERS

v.

QUEST RECOVERY SERVICES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

GREGORY G. GARRE
Acting Solicitor General
Counsel of Record
GRACE CHUNG BECKER
Acting Assistant Attorney General
DIANA K. FLYNN
SARAH E. HARRINGTON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

The United States, which intervened in this litigation to defend the constitutionality of Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 *et seq.* (Title II), will address the following question:

Whether the court of appeals correctly applied this Court's decision in *United States* v. *Georgia*, 546 U.S. 151 (2006), in determining that this case does not present the question whether Title II validly abrogates States' Eleventh Amendment immunity.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 9
Conclusion 15

TABLE OF AUTHORITIES

Cases:

Ashwander v. *TVA*, 297 U.S. 288 (1936) 11
Association for Disabled Americans v. *Florida Int'l Univ.*, 405 F.3d 954 (11th Cir. 2005) 13
Board of Trs. of the Univ. of Ala. v. *Garrett*, 531 U.S. 356 (2001) 11
Bowers v. *NCAA*, 475 F.3d 524 (3d Cir. 2007) 13
Constantine v. *Rectors & Visitors of George Mason Univ.*, 411 F.3d 474 (4th Cir. 2005) 13
Keef v. *State, Dep't of Motor Vehicles*, 716 N.W.2d 58 (Neb. 2006) 13
Klingler v. *Director, Dep't of Revenue*, 455 F.3d 888 (8th Cir. 2006) 13
NCAA v. *Smith*, 525 U.S. 459 (1999) 11
Phiffer v. *Columbia River Corr. Inst.*, 384 F.3d 791 (9th Cir. 2004), cert. denied, 546 U.S. 1137 (2006) 13, 14
Popovich v. *Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir.), cert. denied, 537 U.S. 812 (2002) 6, 7, 12
Tennessee v. *Lane*, 541 U.S. 509 (2004) 7, 11, 12

Cases—Continued: Page

Toledo v. *Sanchez*, 454 F.3d 24 (1st Cir. 2006), cert. denied, 127 S. Ct. 1826 (2007) 13
United States v. *Georgia*, 546 U.S. 151 (2006) 7, 8, 9, 11

Constitution, statutes, regulations and rules:

U.S. Const.:
Amend. XI 4, 6, 7, 14
Amend. XIV 6, 11
§ 1 (Equal Protection Clause) 12
§ 5 3
Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.* 2
42 U.S.C. 12101(a)(2) 2
42 U.S.C. 12101(a)(3) 2
42 U.S.C. 12101(a)(5) 2
42 U.S.C. 12101(a)(7) 3
42 U.S.C. 12101(b)(1) 2
42 U.S.C. 12101(b)(4) 3
Title I, 42 U.S.C. 12111 *et seq.* 3
Title II, 42 U.S.C. 12131 *et seq.* ..... *passim*
42 U.S.C. 12131(1)(A) 3
42 U.S.C. 12131(1)(B) 3
42 U.S.C. 12132 3
42 U.S.C. 12133 4
42 U.S.C. 12134 3
Title III, 42 U.S.C. 12181 *et seq.* 3
Title V, 42 U.S.C. 12201 *et seq.*:
42 U.S.C. 12202 4

Statutes, regulations and rules—Continued: Page

Rehabilitation Act of 1979, § 504:
29 U.S.C. 794 (1988) 3
29 U.S.C. 794 (2000 & Supp. V 2005) 5
28 U.S.C. 2403(a) 7, 8
28 C.F.R.:
Section 35.130(b)(1)(i) 4
Section 35.130(b)(1)(iii) 4
Section 35.130(b)(1)(vii) 4
Section 35.130(b)(7) 4
Section 35.150(a) 4
Section 35.150(a)(1) 4
Section 35.150(a)(3) 4
Section 35.150(b)(1) 4
Section 35.151 4
Fed. R. App. P. 44(a) 7
Sup. Ct. R. 29.4(b) 7

In the Supreme Court of the United States

No. 07-1259

RACHEL HAAS, CAROL HAAS, AND RICHARD HAAS, PETITIONERS

v.

QUEST RECOVERY SERVICES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2b-7b) is not published in the *Federal Reporter* but is reprinted in 247 Fed. Appx. 670. The opinion of the district court (Pet. App. 23e-40e) is reported at 338 F. Supp. 2d 797.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 2007. A petition for rehearing was denied on November 23, 2007 (Pet. App. 1a). The petition for a writ of certiorari was filed on February 19, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, established a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Congress found that, "historically, society has tended to isolate and segregate individuals with disabilities," and that "such forms of discrimination * * * continue to be a serious and pervasive social problem." 42 U.S.C. 12101(a)(2). Discrimination against persons with disabilities, Congress determined, "persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. 12101(a)(3). In addition, Congress found that persons with disabilities

> continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

42 U.S.C. 12101(a)(5). Congress concluded that persons with disabilities

> have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative

> of the individual ability of such individuals to participate in, and contribute to, society.

42 U.S.C. 12101(a)(7). Based on those findings, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment," to enact the ADA. 42 U.S.C. 12101(b)(4); see U.S. Const. Amend. XIV, § 5.

The ADA targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111 *et seq.*, addresses discrimination by employers affecting interstate commerce; Title II, 42 U.S.C. 12131 *et seq.*, addresses discrimination by governmental entities in the operation of public services, programs, and activities; and Title III, 42 U.S.C. 12181 *et seq.*, addresses discrimination in public accommodations operated by private entities.

This case arises under Title II, which provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. A "public entity" includes "any State or local government" and its components. 42 U.S.C. 12131(1)(A) and (B).

Title II instructs the Attorney General to implement its basic prohibition on discrimination through rulemaking, based on the regulations previously promulgated under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (1988). See 42 U.S.C. 12134. The Attorney General's regulations prohibit a public entity from, among other things, denying a benefit to a qualified individual with a disability because of his disability, providing him with a lesser benefit than is given to others, or limiting his enjoyment of the rights and benefits

that are provided to the public at large. See 28 C.F.R. 35.130(b)(1)(i), (iii) and (vii). To that end, each public entity must ensure that "each service, program or activity, * * * when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. 35.150(a). Title II does not "[n]ecessarily require a public entity to make each of its existing facilities accessible"; however, buildings constructed or altered after Title II's effective date must be designed or redesigned to provide accessibility. 28 C.F.R. 35.150(a)(1), 35.151; see 28 C.F.R. 35.150(b)(1). A public entity must "make reasonable modifications" in its "policies, practices, or procedures" to the extent "necessary to avoid discrimination on the basis of disability," unless the accommodation would impose an undue financial or administrative burden on the public entity, or would fundamentally alter the nature of the service. 28 C.F.R. 35.130(b)(7), 35.150(a)(3).

Title II may be enforced through private suits, and Congress has expressly abrogated the States' Eleventh Amendment immunity in any such suits. See 42 U.S.C. 12133, 12202.

2. Petitioners are an individual with a disability and her parents. In 2002, petitioner Rachel Haas (Haas) was struck by a truck while operating an all-terrain vehicle. Pet. App. 9c. She suffered severe injuries, requiring the partial amputation of her left leg and the implantation of a prosthetic elbow and a metal rod in one arm. *Id.* at 60g. Haas subsequently pleaded guilty in Canton, Ohio, Municipal Court to operating the all-terrain vehicle while under the influence of alcohol. The municipal court sentenced Haas, *inter alia*, to complete two six-day driver-intervention programs conducted by respon-

dent Quest Recovery Services, Inc. (Quest). *Id.* at 60g-61g.

Haas entered a Quest facility in Massillon, Ohio, which allegedly was "constructed, owned, and/or maintained by" the State of Ohio. Pet. App. 61g; see *id.* at 10c. At the time, Haas's injuries required her to use a wheelchair for mobility. *Id.* at 61g. According to Haas, Quest's facilities were not wheelchair-accessible and Quest staff refused to accommodate Haas's needs. *Id.* at 62g.

Haas alleges that upon arrival, she was required to crawl with her luggage up to the sixth floor of the building because the building had no elevator and Quest staff refused to provide assistance. Bathroom and shower facilities were also inaccessible. She was required to "hop, scoot, and crawl up and down the steps without any assistance" to receive meals, which were provided in the building's basement. Pet. App. 62g. On one occasion, Haas fell down a staircase and displaced the metal rod in her arm. *Id.* at 63g. After that, Quest agreed to provide meals to Haas in her room, but then allegedly "'forgot' to deliver the food to her on several occasions." *Id.* at 64g. Finally, although Haas's counselor gave her a favorable review, Quest's director allegedly refused to certify that she had completed the program because "her attitude had been unacceptable." *Ibid.* As a result, Haas was incarcerated for six days. *Id.* at 64g-65g.

3. Haas and her parents filed suit against Quest and the City of Canton in the United States District Court for the Northern District of Ohio. Pet. App. 41f-57f. Petitioners subsequently dismissed the City and filed an amended complaint, adding the State of Ohio as a defendant and alleging that the State had violated both Title II and Section 504 of the Rehabilitation Act. See *id.* at

24e, 58g-73g. The State moved to dismiss the Title II and Rehabilitation Act claims against it, asserting both that it was immune from suit under the Eleventh Amendment and that petitioners failed to state a claim. *Id.* at 12c.

The district court dismissed the Title II claim based on the State's Eleventh Amendment immunity. In the district court's view, Title II does not validly abrogate sovereign immunity except to the extent necessary to vindicate plaintiffs' due process right of access to the courts, which was not at issue in this case. Pet. App. 34e. The court held that petitioners could pursue their claim against the State under the Rehabilitation Act, however: the State had waived sovereign immunity by accepting federal funds, and petitioners had stated a claim against the State in its capacity as owner of the property where the Quest facility is located. *Id.* at 34e-35e, 38e-39e.

The parties subsequently settled the case, except for the Title II claim against the State. Petitioners preserved the right to appeal the dismissal of that claim. The district court entered judgment accordingly. Pet. App. 12c.

4. The court of appeals affirmed. Pet. App. 8c-21c. The court first held that petitioners had failed to state a claim against Ohio under Title II of the ADA because, under circuit precedent, petitioners "did not sufficiently plead that the State of Ohio is responsible for Quest's alleged wrongdoing." *Id.* at 17c.

The court further held, relying on circuit precedent from 2002, that Title II was not a valid exercise of Congress's power under the Fourteenth Amendment to abrogate state sovereign immunity. Pet. App. 17c-21c (relying on *Popovich* v. *Cuyahoga County Court of Com-*

mon Pleas, 276 F.3d 808 (6th Cir.) (en banc), cert. denied, 537 U.S. 812 (2002)). The court noted this Court's decision in *Tennessee* v. *Lane*, 541 U.S. 509 (2004), which had upheld Title II's abrogation of Eleventh Amendment immunity as applied to claims involving access to the courts. Because petitioners did not assert an access-to-courts claim, the court of appeals asserted, *Lane* "does not provide us with guidance for this case." Pet. App. 19c. The court therefore concluded that *Popovich* was still controlling and that under the holding of that case, Title II's abrogation was valid only for claims "sounding in due process." *Ibid.* (citing *Popovich*, 276 F.3d at 812). Because petitioners' claims "implicate equal protection concerns" rather than due process, the Sixth Circuit held that the Eleventh Amendment barred their suit. *Ibid.*

5. Petitioners filed a petition for a writ of certiorari. Because the parties and courts below had not notified the Attorney General that the constitutionality of federal law had been called into question in the litigation, see 28 U.S.C. 2403(a); Fed. R. App. P. 44(a); Sup. Ct. R. 29.4(b), the United States invoked its right to intervene. The government recommended that the court of appeals' decision be vacated and the case remanded for further consideration in light of *United States* v. *Georgia*, 546 U.S. 151 (2006), and *Tennessee* v. *Lane*, *supra*. See Gov't Br. at 6-14, *Haas* v. *Quest Recovery Servs., Inc.*, 127 S. Ct. 1121 (2007) (No. 06-263). The United States explained that in *Georgia*, this Court had unanimously agreed that the abrogation question is not presented if a complaint does not allege misconduct that violates Title II. *Id.* at 7-8 (citing *Georgia*, 546 U.S. at 159). Thus, the United States pointed out, under the Sixth Circuit's own Title II analysis (which had concluded that petition-

ers failed to state a claim), this case presented no occasion to address abrogation. *Id.* at 8.

This Court granted the petition, summarily vacated the court of appeals' decision, and remanded the case "for further consideration in light of 28 U.S.C. § 2403(a) to consider the views of the United States." *Haas* v. *Quest Recovery Servs., Inc.*, 127 S. Ct. 1121, 1122 (2007). Justice Ginsburg filed a concurring statement noting that "[i]f, on remand, the Court of Appeals again holds that petitioners failed to state a claim under Title II, this Court would benefit from a fuller statement of the reasoning underling that decision." *Ibid.*

6. On remand, the court of appeals entertained further briefing from the parties, including the United States. In its brief, the government argued that, if the court again determined that petitioners did not state a valid Title II claim against the State, then the court should not reach the question whether Title II validly abrogated the State's sovereign immunity. The government further argued that, if the court concluded that petitioners *did* state a valid Title II claim against the State, then the court should follow the analysis set forth in *Georgia*. Furthermore, the government requested that, if in applying the *Georgia* framework the court concluded that the complaint stated a valid Title II claim against the State that would not amount to a constitutional violation, see *Georgia*, 546 U.S. at 159, then the court should order full briefing on the validity of Title II and its abrogation in the corrections context so that the United States might set forth a full defense of the statute, consistent with 28 U.S.C. 2403(a). Gov't C.A. Letter Br. 2-7.

The court of appeals again affirmed, in an unpublished disposition. Pet. App. 2b-7b. Following the anal-

ysis that this Court set out in *Georgia*, the court examined whether petitioners had stated a claim under Title II before considering the question of abrogation. *Id.* at 4b. The court concluded that they had not, because "[t]he only allegation in the Amended Complaint which might implicate Title II liability is that the State of Ohio owned the building housing the Quest facility." *Id.* at 6b. That allegation was insufficient, the court held, because "the ADA does not necessarily require a public entity to make its existing physical facilities accessible"; petitioners had not alleged any facts (such as a post-ADA renovation) that would give rise to such an obligation; and Ohio's driver-intervention programs appeared on their face to be accessible to people with disabilities. *Id.* at 6b-7b. Because the court of appeals concluded that petitioners had not stated a Title II claim, the court—in accordance with the *Georgia* framework—did not address whether Title II validly abrogates state sovereign immunity in the context implicated by this case (or whether *Popovich* remains good law). *Id.* at 7b.

ARGUMENT

The court of appeals correctly applied the framework set out in *United States* v. *Georgia*, 546 U.S. 151 (2006), and determined that this case does not present the question whether Congress validly abrogated States' sovereign immunity in enacting Title II. As the court of appeals recognized, conduct that does not violate Title II does not raise the abrogation question at all. This case therefore is not a suitable vehicle to address petitioners' arguments in support of abrogation. The threshold question on which the court of appeals ruled is fact-dependent and does not independently merit review. The petition therefore should be denied.

1. Petitioner is incorrect in asserting that the court of appeals "plainly did *not* comply with [this Court's] instructions 'to consider the views of the United States.'" Pet. 8 (quoting *Haas* v. *Quest Recovery Servs., Inc.*, 127 S. Ct. 1121, 1122 (2007)). To the contrary, the court of appeals' disposition on remand is fully consistent with the position the United States urged. The government argued that if the court of appeals remained of the view that petitioners had not stated a claim under Title II, the court should withdraw the portion of its previous opinion that nonetheless opined, contrary to *Georgia*, on the abrogation question. Gov't C.A. Letter Br. 3-4. The court of appeals did just that and, therefore, correctly resolved this case based on its predicate conclusion that the complaint failed to state a Title II claim against the State.*

The court of appeals' opinion on remand properly recognized that "under *Georgia*, the constitutional question—abrogation of Eleventh Amendment immunity—will be reached only after finding a viable claim under Title II." Pet. App. 4b. The court then held that petitioners lack such a viable claim. Accordingly, the court was correct to conclude that it "need not reach the remaining prongs of the *Georgia* analysis," *id.* at 7b, including whether Title II's abrogation of sovereign immunity is constitutionally valid.

2. Because the court of appeals complied with this Court's mandate, properly applied *Georgia*, and thus did not reach the constitutional question, this Court should decline petitioners' invitation to decide that question in the first instance. Indeed, if petitioners cannot state a

* The court of appeals also provided a complete statement of the reasons for that conclusion. See Pet. App. 5b-7b; see also *Haas*, 127 S. Ct. at 1122 (Ginsburg, J., concurring).

claim against Ohio under Title II, the question whether States may sometimes be subject to suit under Title II simply does not affect the disposition of this case. Furthermore, even to the extent petitioners still have a stake in the constitutional question, that question is particularly inappropriate for review in this posture.

This Court's general practice is not to decide legal questions not addressed below. See, *e.g.*, *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999). The Court adheres to that policy with particular firmness when the question not previously addressed is a constitutional one. See, *e.g.*, *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). And questions of Congress's authority to abrogate state sovereign immunity are particularly unsuitable for this Court to take up without a reasoned decision below, because they often require factual development on two levels. First, the precise scope of petitioners' allegations must be established. Even if this Court believed that petitioners had stated a Title II claim, under *Georgia* it would then examine to what extent petitioners allege conduct that violates the Fourteenth Amendment. See *Georgia*, 546 U.S. at 159; see also *id.* at 160, 163 (Stevens, J., concurring) (noting that the lower courts' development of a factual record may be helpful to the proper application of the abrogation analysis). Second, to the extent that petitioners could identify some conduct prohibited by Title II but not by the Fourteenth Amendment, the question whether Title II's abrogation of sovereign immunity is a congruent and proportional use of the power to enforce the Fourteenth Amendment would require consideration of the extensive factual record compiled by Congress. See, *e.g.*, *Tennessee* v. *Lane*, 541 U.S. 509, 524-528 (2004); *Board of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 368-374

(2001). In each of those respects this case would be a particularly poor vehicle for this Court to consider the constitutional question.

3. Nor is there a mature conflict in the lower courts that calls for this Court's intervention at this time. The court of appeals' compliance with this Court's remand order has eliminated any direct conflict on the question of Title II's constitutionality.

This Court's decision in *Lane* refined the analysis that determines the constitutional validity of abrogation provisions, including Title II's. Because remedial legislation like the ADA may have been enacted to address violations of more than one constitutional right, and because identifying the right in question is crucial to determining the degree of judicial scrutiny that applies, the Court focuses not on "Title II * * * as an undifferentiated whole," but on the particular context implicated by each case. *Lane*, 541 U.S. at 530; see *id.* at 522-523 ("Title II * * * seeks to enforce [the Equal Protection Clause's] prohibition on irrational disability discrimination. But it also seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review."). If Title II is valid as applied to the particular context at issue, the Court "need go no further." *Id.* at 531.

Petitioners fail to identify any conflict in the appellate decisions applying *Lane*'s analysis to Title II. Despite petitioners' suggestions to the contrary (Pet. 9, 15, 17-18), the court of appeals in this case no longer relies on *Popovich* v. *Cuyahoga Court of Common Pleas*, 276 F.3d 808 (6th Cir.) (en banc), cert. denied, 537 U.S. 812 (2002), a decision that predated *Lane* and, in the government's view, is irreconcilable with it. See Gov't Br. at 10-13, *Haas*, *supra* (No. 06-263). Indeed, except for the

now-superseded opinion in this case, the Sixth Circuit has not adhered to *Popovich* in any reported disposition since this Court decided *Lane*.

Petitioners rely principally on alleged inconsistencies within a set of decisions that *uphold* Title II's abrogation of sovereign immunity. But any variation in the reasoning of those decisions is largely the product of this Court's instruction in *Lane* that the abrogation analysis should focus on the particular rights and the particular context at issue in each case. See, *e.g.*, *Toledo* v. *Sanchez*, 454 F.3d 24, 40 (1st Cir. 2006) (upholding Title II "as it applies to the class of cases implicating the right of access to public education"), cert. denied, 127 S. Ct. 1826 (2007); *Bowers* v. *NCAA*, 475 F.3d 524, 554-556 (3d Cir. 2007) (same); *Constantine* v. *Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 484-490 (4th Cir. 2005) (upholding "the remedial measures of Title II *only* as they apply to the class of cases implicating the right to be free from irrational disability discrimination in public *higher* education") (second emphasis added); *Association for Disabled Americans* v. *Florida Int'l Univ.*, 405 F.3d 954, 956-959 (11th Cir. 2005) (similar); see also *Klingler* v. *Director, Dep't of Revenue*, 455 F.3d 888, 896-897 (8th Cir. 2006) (holding that Title II did not validly abrogate sovereign immunity in the context of an allegedly discriminatory surcharge on parking placards); *Keef* v. *State, Dep't of Motor Vehicles*, 716 N.W.2d 58, 66-67 (Neb. 2006) (same).

As petitioners note (Pet. 16), the Ninth Circuit categorically upheld Title II before *Lane*, and in a brief 2004 disposition that court deemed its previous reasoning unaffected by *Lane*. See *Phiffer* v. *Columbia River Corr. Inst.*, 384 F.3d 791, 792-793 (9th Cir. 2004) (per curiam), cert. denied, 546 U.S. 1137 (2006). Even if

there are some methodological distinctions between the Ninth Circuit's approach and that in *Lane*, see, *e.g.*, *id.* at 793 (O'Scannlain, J., concurring) (opining that *Lane*'s analysis is "significantly more exacting than that employed by our circuit"), the courts of appeals have not come into direct conflict on the question whether, applying the *Georgia* analysis to a particular context, Title II validly abrogates Eleventh Amendment immunity in that context. And petitioners have provided no reason for the Court to address that question in the absence of such a conflict.

4. Petitioners also contend (Pet. 21-30) that the court of appeals erred in concluding that they failed to state a claim under Title II. As the court of appeals recognized, petitioners would have to prevail on that question before the issue of abrogation would be properly presented. Because the United States intervened only to address the constitutionality of Title II, it has taken no position in this case on the merits of petitioners' ADA claim as pleaded. Nevertheless, insofar as that question interrelates with the constitutionality of Title II's abrogation of sovereign immunity under the *Georgia* framework, the issue does not warrant review either. Petitioners allege no circuit conflict arising from the court of appeals' unpublished disposition, and their contention that the court of appeals erred in concluding that they failed to state a Title II claim against the State turns largely on the factual sufficiency of the allegations of their amended complaint. That fact-bound contention does not merit plenary review in this Court. And given the unsuitability of the constitutional question for certiorari, see pp. 10-12, *supra*, there is no reason to grant certiorari to address whether the complaint states a Title II claim based on the possibility that an affirmative

answer to the latter question could prompt the abrogation issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE
Acting Solicitor General
GRACE CHUNG BECKER
Acting Assistant Attorney General
DIANA K. FLYNN
SARAH E. HARRINGTON
Attorneys

JUNE 2008

04

(3)

No. 07-1259

FILED
AUG 5 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

RACHEL HAAS, et al.,

Petitioners,

v.

QUEST RECOVERY SERVICES, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

NANCY H. ROGERS
Attorney General of Ohio

BENJAMIN C. MIZER
Solicitor General
STEPHEN P. CARNEY*
Deputy Solicitor
**Counsel of Record*
ELISE PORTER
Assistant Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax

Counsel for Respondent
State of Ohio

QUESTION PRESENTED

Whether the court of appeals correctly applied this Court's decision in *United States v. Georgia*, 546 U.S. 151 (2006), in determining that this case does not present the question whether Congress had validly abrogated the States' Eleventh Amendment immunity for claims brought under Title II of the Americans with Disabilities Act (ADA)?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

COUNTERSTATEMENT OF FACTS 3

A. Haas sued the State over her court-directed commitment to a privately run driver-intervention program 3

B. The Sixth Circuit initially affirmed dismissal of Haas's claims, addressing both statutory and constitutional issues 6

C. This Court vacated the Circuit's first opinion and remanded for consideration of the United States' views 7

D. On remand, the Sixth Circuit applied *Georgia* and concluded again that Haas failed to state a claim, and this time it did not reach the Eleventh Amendment issue 8

REASON FOR DENYING THE WRIT 11

A. Haas's question regarding her failure to state a claim under Title II of the ADA does not warrant review 11

1. Haas's factual allegations do not state a claim under any possible theory of ADA Title II liability 11

2. The decision below applied settled ADA law and normal pleading standards to Haas's facts 13

B. The Eleventh Amendment issue does not warrant review here, both because it was not reached below and because the issue is not worthy of review anyway 16

1. This case is not a suitable vehicle to review the Eleventh Amendment issue, because that issue was not, and should not be, reached 16

2. The Eleventh Amendment issue does not even warrant review, as the circuits are not split on the issue 18

C. Haas presents no other issue warranting review 21

CONCLUSION 24

TABLE OF AUTHORITIES

Cases **Page(s)**

Association for Disabled Americans v. Florida Intl. Univ.,
405 F.3d 954 (11th Cir. 2005) 20

City of Boerne v. Flores,
521 U.S. 507 (1997) 17

Elk Grove Unified Sch. Dist. v. Newdow,
542 U.S. 1 (2004) 16

Haas v. Quest Recovery Servs.,
127 S. Ct. 1121 (2007) 6

Haas v. Quest Recovery Servs.,
174 F. App'x 265 (6th Cir. 2006)
(*Haas I*) 6, 12, 18, 19

Haas v. Quest Recovery Servs.,
247 F. App'x 670 (6th Cir. 2007)
(*Haas II*) 9, 12, 18

NCAA v. Smith,
525 U.S. 459 (1999) 16

Nev. Dep't of Human Res. v. Hibbs,
538 U.S. 721 (2003) 17

Papasan v. Allain,
478 U.S. 265, 283 (1986) 15

Phiffer v. Columbia Riv. Corr. Inst.,
384 F.3d 791 (9th Cir. 2004) 20

Pierson v. Ray,
386 U.S. 547 (1967) 21

Popovich v. Cuyahoga County Court of Common Pleas,
276 F.3d 808 (6th Cir. 2002) 7, 18, 19, 20

Saglioccolo v. Eagle Insurance Co.,
112 F.3d 226 (6th Cir 1997) 15

Spector Motor Service, Inc. v. McLaughlin,
323 U.S. 101 (1944) 16

State ex rel. Thompson v. Wall,
28 Ohio Dec. 631 (1914) 22

Tennessee v. Lane,
541 U.S. 509 (2004) ..... *passim*

Toledo v. Sanchez,
454 F.3d 24 (1st Cir. 2006) 20

United States v. Georgia,
546 U.S. 151 (2006) ..... *passim*

Statutes and Rules **Page(s)**

28 C.F.R. § 35.150(a)(1) 13

28 C.F.R. § 35.150(b)(1) 13

28 C.F.R. § 35.151 13

28 C.F.R. § 35.350(b)(1) 10, 14

28 U.S.C. § 2403(a) 7

Americans with Disabilities Act of 1990, 42 U.S.C. §§ 2131 to 12165 ("ADA") ..... *passim*

Fed. R. Civ. P. 12(b)(6) 11, 13, 14, 15

Fed. R. Civ. P. 12(d) 15

Ohio Admin. Code § 3793:4-1-01 *et seq.* 3

Ohio Admin. Code § 3793:4-1-01(C) 4

Ohio Admin. Code § 3793:4-1-01(L) 4

Ohio Admin. Code § 3793:4-1-01(R) 4, 12

Ohio Admin. Code § 3793:4-1-02 4

Ohio Admin. Code § 3793:4-1-02(CC) 4, 12

Ohio Admin. Code § 3793:4-1-02(GG)(12) 4, 12

Ohio Rev. Code § 3793.02(B) 3

Ohio Rev. Code § 3793.10 3

Ohio Rev. Code § 3793.99 4

Rehabilitation Act, 29 U.S.C. § 794(a) 4

Other Provisions **Page(s)**

Eleventh Amendment ..... *passim*

INTRODUCTION

Petitioner Rachel Haas presents no issue worthy of review. The constitutional issue she seeks to raise is not even presented here, and the sole issue squarely presented is merely the factbound question of whether Haas stated a disability discrimination claim. For these reasons, the State of Ohio agrees with the United States that the Court should deny review.

Haas claims that her lawsuit against the State of Ohio, brought in the context of accessibility to alcohol and drug rehabilitation services, raises the issue whether Congress validly abrogated the States' Eleventh Amendment immunity from suit under Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131 to 12165 ("ADA").

The Eleventh Amendment issue is not presented here, however, because the Sixth Circuit held that Haas failed to state a Title II claim, and that statutory hurdle prevented the court from even reaching the constitutional question. The court's statute-first approach followed not only the general, longstanding principle of constitutional avoidance, but also this Court's recent instructions to use this approach in ADA cases against States. See *United States v. Georgia*, 546 U.S. 151 (2006). Indeed, the Court in this very case vacated an earlier decision and remanded with instructions to follow *Georgia*, because the Sixth Circuit had reached the Eleventh Amendment issue even though it found that Haas failed to state a claim. In its new decision, by contrast, the Sixth Circuit correctly stopped with the statutory analysis, as *Georgia* mandates, and it therefore never reached the Eleventh Amendment issue that Haas now raises. Not only is that reason

enough to deny review, but the Eleventh Amendment issue is not worthy of review in the abstract, because the circuits have not split on the issue since this Court last addressed it in *Georgia* and *Tennessee v. Lane*, 541 U.S. 509 (2004).

Even if Haas were right on the merits of whether the Sixth Circuit erred in finding that she failed to state an ADA claim—and she is not—the factbound assessment of her claim in an unpublished decision does not warrant review. Haas does not allege a circuit split on the issue; rather, she insists that the Sixth Circuit did not properly follow its own precedent regarding whether the State's ownership of a building, without more, can render the State liable under the ADA. But as the Sixth Circuit noted, Haas never alleged that the State had built or renovated the building after the ADA was enacted, and under settled ADA law, no building owner can be liable without that trigger.

Finally, Haas's other ancillary issues do not warrant review. The judicial immunity question that she seeks to revive is not presented because she never named the judge as a defendant, nor has she explained how the State is liable for his acts. In any case, such immunity is well-settled and is not worthy of the Court's attention. And her remand issue—her claim that the Sixth Circuit did not obey the Court's instructions to consider the United States's views—is a nonstarter. Not only did the Sixth Circuit consider those views, but as the United States explains in its own opposition, the Sixth Circuit *followed* the United States's approach.

For these and other reasons below, the Court should deny Haas's Petition.

COUNTERSTATEMENT OF FACTS

Because Haas's statement does not fully reflect the case's procedural posture and the nature of the Sixth Circuit decision at issue, this Counterstatement addresses the case's full history.

A. Haas sued the State over her court-directed commitment to a privately run driver-intervention program.

Rachel Haas permanently disabled herself when she drove an all-terrain vehicle while drunk, crashed into a truck, and sustained severe injuries. See Amended Complaint, Petition Appendix ("Pet. App.") 59g-60g. At her criminal trial, she pleaded guilty to driving under the influence of alcohol. *Id.* at 60g. As an alternative to incarceration for her DUI conviction, Judge Richard Kubilus of the Canton Municipal Court ordered her to attend a driver intervention program run by Quest Recovery Systems, Inc. ("Quest"), a private entity. *Id.* at 60g-61g. She was to undergo two six-day driver intervention programs ("DIPs") conducted by Quest. *Id.* at 61g.

The State of Ohio—as part of a comprehensive program for the provision of alcohol and drug addiction services—certifies all of the DIPs that private entities run throughout the State. Ohio Rev. Code §§ 3793.02(B), 3793.10; Ohio Admin. Code § 3793:4-1-01 *et seq.* DIPs are designed to screen, educate, and refer those who are arrested or convicted for driving under the influence:

> A driver intervention program is a program of screening, education and referral for individuals who are arrested and/or

> convicted of operation of a vehicle or water craft under the influence of alcohol and/or a drug of abuse . . . .

Ohio Admin. Code § 3793:4-1-01(C). Ohio law does not certify six-day DIPs, but recognizes only 48-hour and 72-hour DIPs. Ohio Admin. Code § 3793:4-1-02.

Ohio law requires that all entities providing DIPs must "be in compliance with all applicable federal, state, and local laws and regulations," including the ADA and its state and local equivalents. Ohio Admin. Code § 3793:4-1-01(R). In addition, a DIP may not discriminate on the basis of disability and must make its programs available to disabled clients. Ohio Admin. Code § 3793:4-1-02(GG)(12). Ohio law also requires DIPs to meet specific handicap accessibility requirements or have on file a plan for meeting those requirements. Ohio Admin. Code § 3793:4-1-02(CC). If a DIP fails to comply with any requirement, Ohio's Department of Alcohol and Drug Addiction Services can decertify it or otherwise enforce the requirements. Ohio Admin. Code §§ 3793:4-1-01(L); (O); Ohio Rev. Code § 3793.99.

Haas alleged that Quest—a private entity—discriminated against her in the program by failing to accommodate her disabilities. First Amended Complaint ("FAC") ¶¶ 18-30, Pet. App. 62g-65g.

Haas had initially sued both Quest and the City of Canton, but she amended her complaint to remove the city and add the State of Ohio, raising state law claims against Quest and federal claims under the ADA and the Rehabilitation Act, 29 U.S.C. § 794(a),

against both Quest and the State. FAC ¶¶ 31-46, Pet. App. 65g-68g. [1]

Haas alleged that the State was liable because it "was directing certain individuals, through its Municipal Court system, to participate in programs and activities such as that being operated by Quest in lieu of actual incarceration." FAC ¶ 37, Pet. App. 66g. She also alleged that "the Court and/or State" violated Title II by "failing to ensure that [she] was able to participate in and benefit from the services, programs, and activities that were being furnished to non-handicapped individuals." *Id.* She further alleged that "the Court and/or State" discriminated by "ordering her to be confined in a privately operated system that was not handicap accessible." *Id.*

The State of Ohio moved to dismiss the ADA claims for failure to state a claim and, in the alternative, on the basis of Eleventh Amendment immunity. The District Court granted that motion. Opinion and Memorandum, Pet. App. 23e-40e.

---

[1] Haas's claims against Quest are no longer at issue, as she separately settled with it, as noted below. She had once claimed that Quest was the State's agent, FAC ¶ 16, Pet. App. 61g, but her separate acknowledgment that Quest is private, FAC ¶ 3, Pet. App. 59g, along with her settlement with Quest, removes Quest as a basis for liability against the State.

In addition, Haas's parents joined her as Plaintiffs to pursue a loss of consortium claim against Quest, but because that claim is no longer at issue, the State refers to Haas in the singular as the sole remaining Plaintiff and as Petitioner here.

Haas then settled all her remaining claims against Quest and the State.[2] Therefore, the only remaining issue in this case is Haas's appeal of the dismissal of her Title II claims against the State of Ohio.

B. The Sixth Circuit initially affirmed dismissal of Haas's claims, addressing both statutory and constitutional issues.

On appeal, the Sixth Circuit Court of Appeals affirmed the dismissal of all Title II claims against the State of Ohio because the alleged discriminatory acts were all performed by a private party—Quest—without the State's knowledge or approval. *Haas v. Quest Recovery Servs.*, 174 F. App'x 265 (6th Cir. 2006) (*Haas I*), Pet. App. 8c-22c. Despite finding that Haas failed to state an ADA claim, the Sixth Circuit also addressed whether Congress had validly abrogated the State's Eleventh Amendment immunity with regard to Title II claims such as Haas's. The Sixth Circuit had previously decided that a Title II claim did not overcome State immunity if the claim rested entirely on an equal protection theory—that is, if the claim focused solely on differential treatment between the disabled and

---

[2] Justice Ginsburg, concurring in the Court's remand order, questioned whether the State's settlement with Haas included any ADA claims. *Haas v. Quest Recovery Servs.*, 127 S. Ct. 1121, 1122 (2007) (Ginsburg, J., concurring). That settlement included all of the then-extant claims against the State, but because the District Court had by then dismissed the ADA claim, the ADA claim was not included in the settlement. Thus, the ADA claims survived the settlement. To the extent that any of the State's previous statements about the settlement indicated a broader scope, such statements are incorrect.

the non-disabled. *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808, 816 (6th Cir. 2002) (en banc). But *Popovich* also held that if a Title II claim implicated a different constitutional right, such as the due process right to access to courts, the claim overrode the State's immunity. *Id.* Following this framework, the Sixth Circuit held that Haas's claim sounded more in equal protection than in due process, so her claim did not overcome the State's immunity. Pet. App. 20c-21c.

Notably, in reaching the Eleventh Amendment issue, the Sixth Circuit did not follow this Court's then-recent instruction in *United States v. Georgia*, 546 U.S. 151 (2006), which admonished courts to reach that constitutional issue only if a plaintiff first stated a viable ADA Title II claim.

C. This Court vacated the Circuit's first opinion and remanded for consideration of the United States' views.

Haas petitioned the Court for certiorari, and the United States intervened. The United States objected that it had not been notified of the case, even though 28 U.S.C. § 2403(a) requires such notification when a federal statute is challenged, and the State's claim of Eleventh Amendment immunity amounted to such a challenge. The United States further explained that in its view, the Court should grant the petition, vacate the opinion below, and remand for the Sixth Circuit to consider the views of the United States. More specifically, the United States urged that the Sixth Circuit should have applied the three-step analysis articulated in *U.S. v. Georgia*.

The Court agreed with the United States and remanded the case to the Sixth Circuit to consider the views of the United States. *Haas v. Quest Recovery Servs.*, 127 S.Ct. 1121, 1122 (2007). In a concurrence, Justice Ginsburg noted that if the Circuit had properly applied *Georgia*, "it might not have reached the question whether Title II of the [ADA] abrogated the State of Ohio's Eleventh Amendment immunity with respect to [Haas's] claims." *Id.* (Ginsburg, J., concurring). That was so, she explained, "because the Court of Appeals also held that petitioners failed to state a claim for relief against Ohio under Title II." *Id.* Justice Ginsburg also urged the Sixth Circuit to address, on remand, how it concluded that Haas failed to state a claim. *Id.*

D. On remand, the Sixth Circuit applied *Georgia* and concluded again that Haas failed to state a claim, and this time it did not reach the Eleventh Amendment issue.

On remand, the Sixth Circuit directed all parties to submit letter briefs addressing the issue. The United States submitted a brief as intervenor, urging the court to follow *Georgia*. As the United States summarized in its Opposition to this Petition, the federal "government argued that, if the court again determined that [Haas] did not state a valid Title II claim against the State, then the court should not reach the question whether Title II validly abrogated the State's sovereign immunity." U.S. Br. at 8. The United States also urged that if the court did find that Haas stated a claim, then it should proceed with the second and third steps of

Georgia. *Id.* The United States expressed no view as to whether Haas stated a claim.

The State, in its letter brief, said, as did the United States, that the court should not continue if it first found that Haas did not state a claim. Unlike the United States, the State urged the court to find that Haas failed to state a claim.

Haas, in her brief, argued that she did state a claim, and that Title II abrogated the State's immunity in her case. In particular, she asserted that, because she stated an actual constitutional violation, her claim overrode the State's immunity without resort to Congress's prophylactic power to abrogate immunity as to some acts that violate the ADA but do not violate the Constitution.

The Sixth Circuit's second opinion tracked the *Georgia* analysis, and the court again concluded that Haas failed to state a claim. *Haas v. Quest Recovery Servs.*, 247 F. App'x 670 (6th Cir. 2007) (*Haas II*), Pet. App. 2b-7b. As *Georgia* instructs, the Sixth Circuit stopped its analysis there. *Id.* at 7b.

In explaining why Haas failed to state a claim, the Sixth Circuit said that Haas never alleged that the State itself did anything to trigger liability under Title II. First, the court noted that the complaint named the local judge as a State actor, and on that score, the Circuit referred to its earlier decision regarding judicial immunity. *Id.* at 6b. Second, the court noted that landlord liability, based on the State's ownership of the building, would attach only if the State had renovated the building. That was so, the court explained, because the ADA did not require landlords to retrofit old buildings unless the landlord

performed "extensive renovation." *Id.* (citing 28 C.F.R. § 35.350(b)(1)). Haas did not allege any such renovations, so she did not allege facts that could, if true, trigger State liability based on its status as a landlord. *Id.*

Haas now petitions the Court to review the Sixth Circuit's second, newer decision.

REASONS FOR DENYING THE WRIT

A. Haas's question regarding her failure to state a claim under Title II of the ADA does not warrant review.

The Sixth Circuit resolved this case at the first step of the *United States v. Georgia* analysis. Once the court found that Haas failed to state a Title II claim, it did not address the constitutional issue of whether a validly stated Title II claim could hypothetically overcome the State's Eleventh Amendment immunity. For this Court to reach the constitutional issue, then, Haas must first show that the Sixth Circuit erred on the statutory question. And that factbound question is not worthy of this Court's review because the Sixth Circuit correctly applied settled ADA law and Rule 12(b)(6) standards to this case's facts.

1. Haas's factual allegations do not state a claim under any possible theory of ADA Title II liability.

Haas's sole allegations against the State, in ¶¶ 37-38 of the amended complaint, do not state a claim. She says that "the State was directing certain individuals, through its Municipal Court system, to participate in programs" such as Quest's, and that the program violated the ADA. Haas names no state actor here, so her theory is unclear. See FAC ¶¶ 37-38, Pet. App. 66g-67g.

At most, three possible theories exist, but none helps Haas survive dismissal. First, she might argue that the State has arranged the DIP program in such a way as to cause discrimination. But she alleges no facts to support that theory, and indeed, the many

state laws that require compliance with the ADA and other standards show that any allegation or program-wide discrimination is not viable. See, e.g., Ohio Admin. Code § 3793:4-1-01(R) (requiring DIPs to "be in compliance with all applicable federal, state, and local laws and regulations," including the ADA and its state and local equivalents); Ohio Admin. Code § 3793:4-1-02(GG)(12) (providing that DIPs may not discriminate on the basis of disability and must make its programs available to disabled clients); Ohio Admin. Code § 3793:4-1-02(CC) (requiring DIPs to meet specific handicap accessibility requirements or to file a plan for meeting those requirements).

Second, by alleging that the State directs people "through its Municipal Court" into discriminatory programs, Haas might be alleging that the municipal court's act in sending her to Quest was an ADA violation, and that the State is responsible for that. But she did not name the judge or court as a co-defendant, and, as the Sixth Circuit found in its first opinion and repeated in its second, Judge Kubilus has absolute judicial immunity for his sentencing decision. *Haas I*, Pet. App. 15c; *Haas II*, Pet. App. 5b-6b. (And, as further detailed in Part C below, she presents no sound reason for reviewing judicial immunity as an independent question presented.)

Third and finally, Haas's complaint could be generously read, as the court below did, to allege that the State's role as owner of the building at issue triggers ADA liability. See FAC ¶ 14, Pet. App. 61g. But a claim of ownership, standing alone, does not trigger liability without the additional factual allegation—absent here—that the building falls

under the ADA—that is, that it was built or extensively renovated after the ADA was enacted.

The ADA does not require a public entity to make its existing physical facilities accessible. 28 C.F.R. § 35.150(a)(1). Only if the building has undergone construction or alteration after Title II's effective date does it require upgrades to provide accessibility. 28 C.F.R. § 35.151; see also *Lane*, 541 U.S. at 532 (citing 28 C.F.R. § 35.150(b)(1)). Haas fails to allege (1) that the building was built after the effective date of the ADA, or (2) that if it was built earlier, there was any construction or alteration after the effective date, or (3) any other facts establishing that the State of Ohio was required to make the facility in which she was housed accessible.

In short, Haas does not state a claim against the State of Ohio under Title II of the ADA, and nothing about her failure to state a claim warrants review.

2. The decision below applied settled ADA law and normal pleading standards to Haas's facts.

As explained above, the Sixth Circuit correctly found that Haas failed to state a claim. But even if the court were somehow wrong, its statutory conclusion is not worthy of review because it involves solely the application of settled law to Haas's facts. Haas seeks to convert this routine factbound application into a question of pleading standards, but her attempt to do so fails, as the Sixth Circuit applied well-settled legal standards, both as to ADA law and to the Rule 12(b)(6) standard, in finding her allegations insufficient to state a claim.

As noted above, the Sixth Circuit focused on remand on what seems now to be Haas's primary theory—that the State is liable as the landlord or building owner—and the court found that Haas did not state a claim under that theory. That is so because no building owner, whether as a landlord or otherwise, is obliged to update older pre-existing buildings to bring them into compliance with the ADA. Pet. App. 6b. Building owners need only do so when they perform "extensive renovations" on the building. *Id.* (citing 28 C.F.R. § 35.350(b)(1)). Haas never alleged that the State even had an ADA-compliance duty—that is, that it built or renovated the building after the ADA's 1991 enactment. Accordingly, she failed to state a claim.

Haas attempts to circumvent this pleading shortcoming by accusing the Sixth Circuit of requiring heightened pleading for Title II, or suggesting that *United States v. Georgia* somehow lowered the Title II pleading standards. But neither argument is correct. *Georgia* merely repeats the statutory definition in 42 U.S.C. § 12132, without indicating anything more about "stating a claim" under Title II. Nor has Title II itself changed in any way significant to Haas's allegations since her complaint was filed. Thus, the Sixth Circuit merely applied well-tested pleading standards and indisputable ADA law in dismissing Haas's claim.

Just as the Sixth Circuit applied well-established ADA law, so, too, did it use the normal Rule 12(b)(6) standard in conjunction with that ADA law, not any heightened pleading standard. Thus, Haas also fails in her attempt to invoke Rule 12(b)(6) or Rule 8(a) broadly as issues warranting review.

When reviewing an appeal from a district court's Rule 12(b)(6) dismissal, a court must accept all factual allegations as true, but need not accept as fact legal conclusions or unwarranted factual inferences. *Papasan v. Allain*, 478 U.S. 265, 283, 286 (1986). In addition, a court reviewing a Rule 12(b)(6) dismissal does not properly consider evidence outside the complaint. See, e.g., Fed. R. Civ. P. 12(d); Notes of Advisory Committee on 1946 amendments ("[O]n a motion under Rule 12(b)(6) extraneous material may not be considered if the court excludes it, but that if the court does not exclude such material the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56."); *Saglioccolo v. Eagle Insurance Co.*, 112 F.3d 226, 231 (6th Cir 1997).

Thus, Haas must rely exclusively on the factual allegations in her complaint, not on any legal conclusion, unwarranted factual inferences, or facts not in the complaint itself. Any facts or conclusions in her later briefs, including in the Petition, do not matter unless she can point to facts in the complaint sufficient to state a claim.

And, as shown above, none of her possible theories of liability are supported by sufficient allegations in the Amended Complaint. She cannot now, for example, assert more about the building, such as a renovation history—nor does she even try. Nor can she ask for unwarranted inferences about the building, or about the judge's actions, or about any other allegation that might shore up any of her theories of liability. Her complaint's allegations fell short, under standard Rule 12(b)(6) analysis, and that shortcoming does not warrant review.

B. The Eleventh Amendment issue does not warrant review here, both because it was not reached below and because the issue is not worthy of review anyway.

1. This case is a not a suitable vehicle to review the Eleventh Amendment issue, because that issue was not, and should not be, reached.

This Court cannot reach Haas's Eleventh Amendment argument because, as explained above, the Sixth Circuit correctly found that she failed to state an ADA claim. Even if Haas were right on the statutory issue, though, the constitutional issue would not warrant review, for two reasons. First, Haas still needs to clear several hurdles under *Georgia's* three-step analysis. Second, Haas would need the Court to abandon both its firm practice against deciding issues not addressed below, *NCAA v. Smith*, 525 U.S. 459, 470 (1999), and its "'deeply rooted' commitment 'not to pass on questions of constitutionality' unless adjudication of the constitutional issue is necessary," *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004) (quoting *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944)).

Haas needs to clear all three *Georgia* hurdles to reach her constitutional issue, but she cannot clear any. First, this Court would need to scrutinize Haas's complaint to determine "which aspects of the State's alleged conduct violated Title II," 546 U.S. at 160, and it would have to reverse the Sixth Circuit on that score. Second, in new territory, the Court

would need to determine "to what extent such misconduct *also* violated the Fourteenth Amendment." *Id.* That is, the Court would have to scrutinize the complaint again, looking this time for a Fourteenth Amendment violation. Third, the Court would then ask, "insofar as such misconduct violated Title II, but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid." *Id.*

Even if Haas were able to clear those three *Georgia* hurdles, Haas would need to ask the Court to address the complicated question of abrogation without benefit of any review below. As the Court's several Eleventh Amendment cases show, the abrogation question typically involves extensive review of the congressional record involved in adopting the statute at issue—here, the ADA's Title II—as part of analyzing whether the statute is a "congruent and proportional" use of the Congress's power to abrogate State immunity. See, e.g., *Lane*, 541 U.S. at 516-17, 522-27 (examining record as to ADA Title II); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 727-728 (2003) (same, as to Family and Medical Leave Act); *City of Boerne v. Flores*, 521 U.S. 507, 530-33 (1997) (same, as to Religious Freedom Restoration Act). Haas would have the Court do all that in the first instance, with no lower-court analysis at all.

In sum, this case almost certainly would not allow the Court to reach Haas's Eleventh Amendment argument at all.

2. The Eleventh Amendment issue does not even warrant review, as the circuits are not split on the issue.

Even if the Court could clear the several legal and prudential issues above to reach the constitutional issue, the question of the States' Eleventh Amendment immunity does not warrant review, even in the abstract, and the split Haas claims does not exist. Haas's fundamental error is that she attacks the Sixth Circuit's 2006 decision in *Haas I*, not the opinion after remand in 2007 in *Haas II*. And she looks to outdated case law in both the Sixth Circuit and other circuits, from before this Court clarified abrogation issues regarding Title II in both *Georgia* and *Lane*.

First, and notably, as evidence of the Sixth Circuit's side of the alleged "split," she repeatedly cites *only* the Circuit's *first* decision in this case, not the decision from which she now petitions. See Pet. at 13 n. 5 (citing *Haas I*); *id.* at 15, 17 (same). But this Court has already vacated that decision, so it cannot be the basis for a circuit split.

Second, Haas additionally relies on a pre-*Lane* Sixth Circuit case as evidence of the Circuit's view on abrogation, but the Circuit has apparently never relied on that decision since *Lane*. See Pet. at 15 (citing *Popovich*, 276 F. 3d 808). In *Popovich*, the Sixth Circuit had, as Haas explains, see Pet. at 15, developed the theory that ADA Title II claims could overcome Eleventh Amendment immunity if those claims are based on "unreasonable exclusion from judicial proceedings based on disability in a due process-type claim," but not if the claims "are based

on equal protection principles." *Popovich*, 276 F.3d at 816. Haas is right in her general description of *Popovich*, but she is mistaken in insisting that "the Sixth Circuit persists in abiding by the *en banc* ruling in *Popovich*." Pet. at 15.

This Court's *Lane* decision in 2004 reshaped the landscape regarding abrogation of State immunity as to various types of ADA Title II claims, and the Sixth Circuit has not addressed the issue since *Lane*. In *Lane*, the Court agreed with the Sixth Circuit that the abrogation question was not a global one as to all Title II claims, so it limited its review to the immediate question of Title II claims concerning access to courts. *Lane*, 541 U.S. at 530 ("[N]othing in our case law requires us to consider Title II, with its wide variety of applications, as an undifferentiated whole."). This Court's *Lane* decision discussed *Popovich* because both *Lane* and *Popovich* involved access to courts. But while the Court agreed with the Sixth Circuit on one side of the *Popovich* coin—namely, that court access claims did trump State immunity—the Court did not in any way address the other side of *Popovich*, namely, the decision that other claims, such as those "based on equal protection principles," could *not* trump immunity.

In the four years since *Lane* set a new framework, the Sixth Circuit has not returned to the issue, and Haas's claim that the Circuit "persists" is puzzling. She cites no post-*Lane* case from the Circuit, other than the vacated 2006 *Haas I* decision. Nor could the State find any. Likewise, as the United States notes, the Sixth Circuit shows no signs of relying on *Popovich*. U.S. Br. at 12-13 ("Indeed, except for the now-superseded opinion in this case,

the Sixth Circuit has not adhered to *Popovich* in any reported disposition since this Court decided *Lane*."). While the State might disagree with the United States on its specific claim that *Popovich* and *Lane* are "irreconcilable," U.S. Br. at 12, or on the general issue of the scope of abrogation versus immunity as to other Title II claims after *Lane*, the State agrees fully with the United States in its description of the current state of the law in our Circuit.

The State also agrees with the United States's conclusion that no split exists among the circuits nationwide. *Id.* at 12-14. Haas's view of the split depends on placing the Sixth Circuit on one side, with other circuits that have spoken uniformly on the other side. Once the Sixth is removed, as it must be, no split—soft or hard, old or new—remains.

With no division of authority, the details of the other circuit cases do not matter. Nevertheless, the common point is that the courts in those cases *did reach* the Eleventh Amendment issue, and all found abrogation, either globally or as to the claims at issue. Thus, none forms a conflict with each other, let alone with the decision below, in which the Sixth Circuit did not reach the issue at all. See Pet. at 16 (citing *Toledo v. Sanchez*, 454 F.3d 24 (1st Cir. 2006) (finding abrogation in that case); *Phiffer v. Columbia Riv. Corr. Inst.*, 384 F.3d 791 (9th Cir. 2004) (finding global abrogation for Title II claims); *Association for Disabled Americans v. Florida Intl. Univ.*, 405 F.3d 954 (11th Cir. 2005) (finding abrogation in that case)); see also U.S. Br. at 12-13 (summarizing the lack of any conflict here).

Consequently, even if the Eleventh Amendment were raised here, that issue does not currently warrant review.

C. Haas presents no other issue warranting review.

Haas raises several other issues that are not worthy of the Court's attention.

Haas's second Question Presented concerns judicial immunity, and that issue does not warrant review. Such immunity is well-settled, and while Haas tries to add currency by questioning whether immunity applies to "sentencing orders that result in an individual suffering [illegal] disparate treatment" the Court has already held that absolute judicial immunity applies with undiminished force even when the judge is accused of discriminating on the basis of race. *Pierson v. Ray*, 386 U.S. 547, 553-555 (1967). Haas shows no lower-court confusion on the issue or any other reason to revisit this settled law.

Further, although the court below cited judicial immunity in ruling against Haas, her attempt to base State liability on the judge's sentencing order fails in two other independent ways. Haas can claim a Title II violation by this path only if she alleges (1) that the judge did something that amounts to a violation, (2) that the judge's acts are attributable to the State and (3) that she overcomes judicial immunity. First, Haas did not name Judge Kubilus as a defendant, and in describing his acts, she openly admits that "there is no reason whatsoever to believe that Municipal Judge Kubilus had intended for [Haas] to be confined in a non-compliant facility." Pet. App. 21. Second, she does not show that the

municipal judge is a state agent as a matter of law, and Ohio law has long held that he is not. See *State ex rel. Thompson v. Wall*, 28 Ohio Dec. 631 (1914) (holding that municipal judge is not a State officer). Thus, the court need not have reached the judicial immunity issue.

Further, Justice Ginsburg's question in her concurrence regarding judicial immunity is best answered by considering Haas's failure to establish any theory of liability based on the judge's acts to begin with. Specifically, Justice Ginsburg noted that "no judge was named a defendant" and questioned the authority for "according the benefit of judicial immunity to defendants who are not judges." *Haas*, 127 S.Ct. at 1122 (Ginsburg, J., concurring). The answer is that the lack of a judicial defendant, coupled with Haas's admission that the judge did nothing wrong, means that Haas has no theory of liability through the judge to begin with. Immunity, therefore, does not matter.

Thus, Haas's second Question Presented does not warrant review.

Haas's third Question Presented combines two notions: (1) that the Sixth Circuit did not follow this Court's remand instructions "to consider the views of the United States," and (2) that the Circuit held her to a higher pleading standard. As to the first, the court did consider the United States' views: the United States urged the Sixth Circuit not to reach the constitutional issue if the court again found that Haas failed to state a claim, and that it exactly what the court did. See U.S. Br. at 10 ("[T]he court of appeals' disposition on remand is fully consistent with the position the United States urged."). As to

the second, the State's explanation of the pleading standard above (at 12-13), covers why that issue is a nonstarter.

Finally, Haas's fourth Question Presented essentially restates the heightened pleading standard in another way, suggesting that it was unfair to hold Haas's "60-paragraph" complaint to the standard of *Georgia*. First, as explained above, the Sixth Circuit did not apply any heightened pleading standard. Second, the points on which *Haas* stumbled were not in any way affected by *Georgia;* she failed to state a claim under established ADA law. *Georgia*'s significance here is the importance of resolving the statutory ADA issue before reaching Eleventh Amendment issues, but *Georgia* changed nothing about how to resolve whether a claim is stated. Thus, nothing about this Question Presented warrants review.

CONCLUSION

The Court should deny the Petition.

Respectfully submitted,

NANCY H. ROGERS
Attorney General of Ohio

BENJAMIN C. MIZER
Solicitor General
STEPHEN P. CARNEY*
Deputy Solicitor
**Counsel of Record*
ELISE PORTER
Assistant Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax

Counsel for Respondent
State of Ohio

August 6, 2008

104

(4)

No. 07-1259

FILED
AUG 18 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

Rachel Haas, Carol Haas, and Richard Haas
Petitioners,

v.

Quest Recovery Services, Inc. and State of Ohio
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

W. Craig Bashein, Esq.
Bashein & Bashein Co., L.P.A.
3500 Terminal Tower
50 Public Square
Cleveland, Ohio 44113
(216) 771-3239

Paul W. Flowers, Esq.*
Paul W. Flowers Co., L.P.A.
3500 Terminal Tower
50 Public Square
Cleveland, Ohio 44113
(216) 344-9393

Attorneys for Petitioners
*Counsel of Record

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY 1

I The Opinion of the Sixth Circuit Court of Appeals squarely conflicts with decisions of the First, Ninth, and Eleventh Circuit Courts of Appeal and unjustifiably subverts Congressional intent to redress all forms of governmental handicap discrimination through Title II of the Americans with Disabilities Act. 1

II. The Sixth Circuit's overly expansive view of absolute judicial immunity now permits governmental entities in that jurisdiction to discriminate with impunity against anyone who is subject to a judicial order. 6

III. Petitioners' First Amended Complaint alleging a claim of Title II disability discrimination satisfies the notice-pleading requirements imposed by Fed.R.Civ.P. 8(a), particularly given that the pleading was prepared without the benefit of *Georgia*, 546 U.S. 151. 8

CONCLUSION 13

TABLE OF AUTHORITIES

Case Law

Alfano v. Bridgeport Airport Servs., 373 F. Supp. 2d 1, 3-7 (D. Conn. 2005) 11

Association for Disabled Americans v. Florida Intl. Univ., 405 F. 3d 954 (11th Cir. 2005) 3

Bowers v. National Coll. Athl. Ass'n., 475 F. 3d 524, 550-556 (3rd Cir. 2007) 3

Cleburne v. Cleburne Living Cntr.,473 U.S. 432, 448, 105 S.Ct. 3249, 3258, 87 L.Ed.2d 313 (1985) 2

Consistent with Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721, 123 S. Ct. 1972, 155 L.Ed. 2d 93 (2003) 3

Constantine v. Rectors and Visitors of George Mason Univ., 411 F. 3d 474, 499 (4th Cir. 2005) 11

Cooper v. Weltner, U. S. Dist. Ct., D. Kan., Case No. 97-3105-JTM, 1999 W. L. 1000503 10

Costabile v. County of Westchester, New York, 485 F. Supp. 2d 424, 433-435 (S.D. N.Y. 2007) 11

Cox v. Correctional Med. Servs., U. S. Dist. Ct., E. D. Mich., Case No. 06-CV-10350-DC, 2007 W.L. 2873208 *7 (February 20, 2007) 5

Fiscus v. Wal-Mart Stores, Inc., 385 F. 3d 378, 385 (3rd Cir. 2004) 11

Georgia, 546 U.S. 151 ..... passim

Goodwin v. Caruso, U. S. Dist. Ct., W. D. Mich., Case No. 2:05-CV-150, 2005 W. L. 1667391 (July 15, 2005) 5

Haas v. Quest Recovery Servs., ___ U.S. ___, 127 S. Ct. 1121, 166 L. Ed. 2d 888 (2007) 7, 8

Klingler v. Director, Dept. of Rev., 455 F. 3d 888, 896-897 (8th Cir. 2006) 4

Phiffer v. Columbia Riv. Corr. Inst., 384 F. 3d 791, 792-793 (9th Cir. 2004) 3

Pierce v. County of Orange, 526 F. 3d 1190, 1222 (9th Cir. 2008) 11

Pierson v. Ray, 386, U. S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967) 7

Popovich v. Cuyahoga County Court of Common Pleas, 276 F.3d 808 (6th Cir. 2002) (en banc) .....passim

Schotz v. Cates, 256 F. 3d 1077, 1080 (11th Cir. 2001) 10

Skibbe v. Michigan Dept. of Corr., U. S. Dist. Ct., W. D. Mich., Case No. 1:05-CV-175, 2006 W. L. 625869 *3 (March 9, 2006) 5

Tanney v. Boles, 400 F. Supp. 2d 1027, 1044-1045 (E. D. Mich. 2005).....4

Tennessee v. Lane, 541 U.S. 509, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004) 4

Toledo v. Sanchez, 454 F. 3d 24 (1st Cir. 2006).....3, 10

Zibbell v. Granholm, U. S. Dist., W. D. Mich., Case No. 2:07-CV-96, 2008 W.L. 1766588 *5 (April 14, 2008).....5

Regulations

42 U.S.C. §1983 7

Fed. R. Civ. P. 8.....11

Fed.R.Civ.P. 8(a) .....i, 8
28 C.F.R. §35.150(b)(1).....9
28 C.F.R. Pt. 35 10

REPLY

I. The Opinion of the Sixth Circuit Court of Appeals squarely conflicts with decisions of the First, Ninth, and Eleventh Circuit Courts of Appeal and unjustifiably subverts Congressional intent to redress all forms of governmental handicap discrimination through Title II of the Americans with Disabilities Act.

What is perhaps most striking about the Brief in Opposition to Writ of Certiorari which has been submitted by Respondent, State of Ohio (hereinafter "State's Brief"), is the absence of any discernable response to several critical issues. For example, no attempt has been made to explain how a "rational basis" can exist for the failure to furnish Petitioner, Rachel Haas, with the handicap accessibility features and equipment she needed to avoid having to hop up and down stairs on her one remaining leg, shower without having to sit on the floor, freely move her wheelchair in and out of her room, and otherwise participate in the Driver Intervention Program (DIP) she was obligated to attend. In paragraphs 35 through 38 of her First Amended Complaint, Petitioner had squarely alleged that she had suffered unjustifiable and unlawful "disparate treatment" which her non-disabled counterparts had not been forced to endure. *Corrected Petition for Writ of Certiorari filed February 19, 2008 (hereinafter "Cert. Pet."), Appendix pp. 66g-67g.* Respondent's inability to formulate a "rational basis" for the condition of the state-owned facility serves to confirm the validity of this classic case of a

core equal protection violation. *Cleburne v. Cleburne Living Cntr.*,473 U.S. 432, 448, 105 S.Ct. 3249, 3258, 87 L.Ed.2d 313 (1985). Proper application of this Court's recent decision in *United States v. Georgia*, 546 U.S. 151, 126 S.Ct. 877, 163 L.Ed.2d 650 (2006), leads to the inescapable conclusion that no Eleventh Amendment immunity is available to Respondent.

Respondent has attached great significance to the existence of administrative regulations in Ohio requiring that DIP facilities to be handicap accessible. *States' Brief, p. 4.* It is evident that these provisions are not actually being enforced and Congress' refusal to allow the states to police themselves is thus sound. The only architectural testimony which was ever submitted before the Rehabilitation Act claim was settled confirmed, in no uncertain terms, that the building where Petitioner was housed did not contain even the most basic equipment and features necessary for her to fully and properly participate in the program. *Plaintiff's Revised Motion for Partial Summary Judgment filed September 30, 2004, Exhibit A.* Tellingly, Respondent has stopped well-short of ever representing in the instant appeal that the structure was indeed fully handicap accessible in accordance with all controlling federal and state regulations. There is thus no basis for Sixth Circuit's astonishing determination, which was supposedly reached from the pleadings alone, that the DIPs "when viewed in their entirety, are readily accessible to be usable by individuals with disabilities" *Cert. Pet., Appendix p. 6b.*

Although the appellate court's Opinion on Remand of August 21, 2007 was carefully confined to the

heightened pleading standards which have now been imposed upon individuals seeking relief under the Americans with Disabilities Act (ADA), the fact remains that Respondent's Eleventh Amendment analysis in the proceedings below had been centered upon *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002) (*en banc*), which rests upon one side of a deep conflict which had developed amongst the circuits. Consistent with *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 123 S. Ct. 1972, 155 L.Ed. 2d 93 (2003), the First, Ninth and Eleventh Circuits have all concluded that Congress properly abrogated this grant of immunity as permitted by Section 5 of the Fourteenth Amendment. *Toledo v. Sanchez,* 454 F. 3d 24 (1st Cir. 2006); *Phiffer v. Columbia Riv. Corr. Inst.,* 384 F. 3d 791, 792-793 (9th Cir. 2004); *Association for Disabled Americans v. Florida Intl. Univ.,* 405 F. 3d 954 (11th Cir. 2005). The schism is plainly widening, as the Third Circuit recently recognized in *Bowers v. National Coll. Athl. Ass'n.,* 475 F. 3d 524, 550-556 (3rd Cir. 2007), that the legislature acted within its constitutional authority by seeking to eradicate handicap discrimination within the public education system.

There is no truth to the State's representations that the Sixth Circuit stands alone in refusing to recognize the full constitutional validity of Title II of the ADA. *State's Brief, p. 20* ("Once the Sixth is removed, as it must be, no split – soft or hard, old or new · remains.") As had been observed earlier in these proceedings, the Eighth Circuit shares the misguided view that Congress went too far in allowing damages to be recovered in response to State-sponsored handicap discrimination. *Klingler v. Director, Dept. of Rev.,*

455 F. 3d 888, 896-897 (8th Cir. 2006). Notably, this rash ruling was issued after both *Tennessee v. Lane*, 541 U.S. 509, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004), and *Georgia,* 546 U. S. 151, both of which were examined by the appellate court. There is thus no merit to the assertion, which both Respondents and Intervenor have asserted over – and – over, that uniformity was achieved across the United States following this Court's last venture into the Eleventh Amendment thicket.

Respondent has criticized Petitioners for failing to identify any "post-*Lane*" authorities from the Sixth Circuit confirming that *Popovich*, 276 F. 3d 808, is still being followed. *State's Brief, pp. 19-20.* Intervenor also seems to feel that "except for the now-superseded opinion in this case, the Sixth Circuit has not adhered to *Popovich* in any reported disposition since this Court decided *Lane*. *United States' Brief, pp. 12-13.* What they are both neglecting to mention is that the district courts in the Sixth Circuit remain duty-bound to abide by the deeply flawed *en banc* opinion, which has yet to be modified in any manner, let alone overturned. Well after the release of *Lane*, it was recognized in *Tanney v. Boles*, 400 F. Supp. 2d 1027, 1044-1045 (E. D. Mich. 2005), that:

> A Title II ADA claim against a government official in her official capacity for money damages is barred if it sounds in equal protection rather than due process. *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F. 3d 808, 811 (6th Cir. 2002). [footnote omitted]

A motion to dismiss was granted in that instance because "the basis of the only ADA claim Plaintiff asserts sounds in equal protection." *Id. at 1046.* Numerous courts within this jurisdiction have been forced to reach the same harsh result. *Skibbe v. Michigan Dept. of Corr.*, U. S. Dist. Ct., W. D. Mich., Case No. 1:05-CV-175, 2006 W. L. 625869 *3 (March 9, 2006), unreported (upholding Eleventh Amendment challenge to handicap discrimination claim based upon *Popovich*); *Goodwin v. Caruso*, U. S. Dist. Ct., W. D. Mich., Case No. 2:05-CV-150, 2005 W. L. 1667391 (July 15, 2005), unreported (citing *Popovich* and concluding that the "Sixth Circuit has expressly ruled that the Eleventh Amendment bars a Civil Rights action to the extent that it relied on congressional enforcement of equal protection in non-employment ADA cases, although a due process claim of denial of participation in public services was not barred"; *Zibbell v. Granholm*, U. S. Dist., W. D. Mich., Case No. 2:07-CV-96, 2008 W.L. 1766588 *5 (April 14, 2008), unreported (holding that state agencies are entitled to immunity on ADA claims as a result of *Popovich*); *Cox v. Correctional Med. Servs.*, U. S. Dist. Ct., E. D. Mich., Case No. 06-CV-10350-DC, 2007 W.L. 2873208 *7 (February 20, 2007), unreported (Magistrate's decision recommending dismissal of Title II ADA claim on the basis of *Popovich's* Eleventh Amendment immunity analysis). Countless other disabled residents of Ohio, Kentucky, Tennessee and Michigan have undoubtedly refrained from even filing Title II ADA claims against state agencies and instrumentalities out of recognition that the *en banc* opinion in *Popovich,* 276 F. 3d 808, remains the law of the land. Unless and until this Court intercedes, the

full benefits and protection which Congress intended to afford will likely never be realized.

Since *Popovich* remains alive and well and the Eighth Circuit is now following the same unduly restrictive view of Congressional authority, the United States' sound analysis of the fundamental flaws in these holdings should be carefully considered. When Petitioners first requested *certiorari* from this Court two (2) years ago, the Intervenor cogently explained that at least two (2) separate justifications existed for holding that Title II of the ADA had completely abrogated Eleventh Amendment immunity. *Brief for the United States as Intervenor, Case No. 06-263 filed September 29, 2006, pp. 7-13.* First *Georgia*, 546 U.S. 151, had been decided during the course of Petitioners' appeal and concerned "a similar challenge to the operation of correctional facilities and programs". *Id., p. 8.* Therein, this high court ruled that immunity was unavailable when the discrimination "*actually* violates the Fourteenth Amendment", which had never been previously considered by the Sixth Circuit. *Id., pp. 8-9 (italics original).* Second *Popovich* is – in the words of the United States – "irreconcilable with *Lane*". *Id. p. 10.* There thus appears to be no dispute amongst the parties to the instant appeal that this outdated Sixth Circuit precedent must go.[1]

II. The Sixth Circuit's overly expansive view of absolute judicial immunity now permits governmental entities in that jurisdiction to

---

[1] Respondent also appears to be conceding that *Popovich* "must be" set aside. *States' Brief, p.20.*

discriminate with impunity against anyone who is subject to a judicial order.

Neither Respondent nor Intervenor have made any attempt to trivialize the frightening implications of the Sixth Circuit's theory of absolute judicial immunity. Respondent's position is simply that the law is "well-settled" in this regard and there is thus no "reason to revisit this settled law." *States' Brief, p. 21.* Apparently, the law is not "settled" enough for the State to be able to locate a judicial opinion issued from outside the Sixth Circuit actually holding that "absolute judicial immunity" applies to the claims of a disabled criminal defendant who is required to endure confinement in a non-handicapped state-owned facility, because none have been cited. *Id., pp. 21-23.* The only decision which has been identified in support of this "well-settled" law is *Pierson v. Ray*, 386, U. S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967), which held only that a judge may not be sued for civil rights violations under 42 U.S.C. §1983 for acts committed within his/her judicial discretion. *States' Brief, pp. 21-22.* As Justice Ginsburg had intimated during Petitioners' first appearance before this Court, such a principle would seemingly have no application here since no judge has been named as a defendant. *Haas v. Quest Recovery Servs.*, ___ U.S. ___, 127 S. Ct. 1121, 166 L. Ed. 2d 888 (2007).

In attempting to formulate a response to Justice Ginsburg's query as to how absolute judicial immunity could apply in this instance, Respondent has offered that:

> The answer is that a lack of a judicial defendant, coupled with [Petitioner's]

> admission that the judge did nothing wrong, means that [Petitioner] has no theory of liability through the judge to begin with. Immunity, therefore, does not matter.

States' Brief, p. 22. Exactly! Even though Petitioners had never once sought to hold the municipal judge liable for the deplorable condition of the DIP facility, the Sixth Circuit felt compelled to find that they were "in effect suing the State of Ohio in attempt to sue the municipal court judge" *Cert. Pet., Appendix, p. 14c.* Just as the District Judge did, the court's analysis then veered wildly into the theory that the disabled DIP program participant had no legal basis to complain about her non-handicapped accessible accommodations since she was attending the facility by court order. *Id., pp. 14c-18c.* As Respondent now seems to be conceding, this holding is legally indefensible. Before courts begin routinely dismissing claims brought by individuals confined in correctional facilities alleging discrimination of all forms (racial, sexual, handicap, *etc.*) on the grounds that "absolute judicial immunity" attaches to the sentencing order, this Court should accept this opportunity to carefully consider the wisdom of the Sixth Circuit's holding.

III. Petitioners' First Amended Complaint alleging a claim of Title II disability discrimination satisfies the notice-pleading requirements imposed by Fed.R.Civ.P. 8(a), particularly given that the pleading was prepared without the benefit of *Georgia*, 546 U.S. 151.

It seems highly unlikely that the Sixth Circuit will ever have occasion to reconsider *Popovich*, 276 F. 3d 808, given the exceedingly high pleading requirements which have now been imposed upon Title II claimants. Respondent contends that the theory of Title II liability which is based upon the State's ownership and control of the DIP facility requires "the additional factual allegations – absent here – that the building falls under the ADA – that is, that it was built or extensively renovated after the ADA was enacted." *States' Brief, pp. 12-13.* One would have thought that the government would be troubled by the fact that they have made this bold declaration without any citation to any judicial authorities from anywhere in the United States, but this does not appear to be the case. The State also remains unconcerned with its continued inability to explain how Petitioners were supposed to allege details as to when the building was constructed and "extensively renovated" without the benefit of discovery.

Respondent's latest challenges to the sufficiency of First Amended Complaint are based upon 28 C.F.R. §35.150(b)(1) which supposedly removes existing structures from the scope of Title II save only when there have been "extensive renovations.". *States' Brief, p. 14.* In reality, the provision states merely:

> ***A public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. A public entity, in making alterations to existing buildings, shall meet the accessibility requirements of §35.151. In choosing among available methods for

> meeting the requirements of this section, a public entity shall give priority to those methods that offer services, programs, and activities to qualified individuals with disabilities in the most integrated setting appropriate. [emphasis added]

As can be readily observed, neither this subsection – nor any other regulation which the undersigned counsel has been able to locate – actually excuses non-compliance with federally mandated handicapped accessibility requirements for every existing structure which has yet to undergo "extensive renovation". The narrow exception applies only when "other methods can make the program or service accessible." *Toledo,* 454 F. 3d at 39; *Schotz v. Cates,* 256 F. 3d 1077, 1080 (11th Cir. 2001); *Cooper v. Weltner,* U. S. Dist. Ct., D. Kan., Case No. 97-3105-JTM, 1999 W. L. 1000503 *5-6, unreported. States and other public entities certainly are not free to discriminate against the handicapped by forcing them into un-renovated facilities, as the Ninth Circuit has explained:

> While the County need not make all of its existing facilities accessible to individuals with or without disabilities, it is expected to provide "program access." 28 C.F.R. Pt. 35, App. A. Any type of educational, vocational, rehabilitative, or recreational program, service, or activity offered to non-disabled detainees should, when viewed in its entirety, be similarly available to disabled detainees who, with or without reasonable accommodations, meet the essential eligibility requirements to participate. Whether

> this "program access" standard may reasonably be met or whether any restriction on access is reasonably related to a legitimate government objective is necessarily fact-specific. *** [emphasis added]

Pierce v. County of Orange, 526 F. 3d 1190, 1222 (9th Cir. 2008). This federally mandated "program access" requirement lies at the heart of Petitioners' Title II claim against Respondent.

The better reasoned view which is in force in more enlightened circuits is that an ADA claim only requires allegations that the plaintiff "was excluded from participation in, or denied the benefits of, a program or service offered by a public entity, *or* subjected to discrimination by that entity." *Constantine v. Rectors and Visitors of George Mason Univ.,* 411 F. 3d 474, 499 (4th Cir. 2005) (citation omitted). There can be no legitimate disagreement that the First Amended Complaint supplies a "short and plain statement of the claim" sufficient to satisfy the minimal requirements of Fed. R. Civ. P. 8 (a). *Fiscus v. Wal-Mart Stores, Inc.,* 385 F. 3d 378, 385 (3rd Cir. 2004); *Costabile v. County of Westchester, New York,* 485 F. Supp. 2d 424, 433-435 (S.D. N.Y. 2007); *Alfano v. Bridgeport Airport Servs.,* 373 F. Supp. 2d 1, 3-7 (D. Conn. 2005).

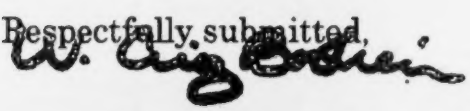
The federal government's primary contention is that following the remand from this Court the appellate panel correctly determined that the First Amended Complaint still failed to allege a potentially viable claim for relief "in accordance with the *Georgia* framework". *United States' Brief p.9.* The glaring

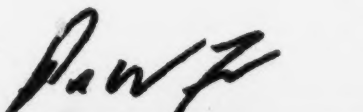
flaw in this logic, which neither Intervenor nor Respondent have thus far been willing to confront, is that *Georgia*, 546 U.S. 151, was issued after the District Court proceedings had concluded, the appeal had been fully briefed, and oral argument had been conducted. At no time were Petitioners ever afforded an opportunity to revise their pleadings to reflect the current state of Eleventh Amendment jurisprudence. At the time their pleading were prepared, *Popovich*, 276 F. 3d 808, reigned supreme in the Sixth Circuit and ADA claims against the State sounding strictly in equal protection were barred. Petitioners' objective was to seek a substantial modification, if not outright reversal, of the deeply flawed ruling either in the Sixth Circuit or before this Court and they had no reason to believe that artful pleading would allow them to avoid such a confrontation. Intervenors' glowing praise of the Sixth Circuit's dismissal of the First Amended Complaint on the basis of the new standard which was announced by this Court in *Georgia* while the appeal was still pending is thus seriously misguided.

CONCLUSION

For the forgoing reasons, this Court should grant certiorari over these proceedings.

Respectfully submitted,





W. Craig Bashein, Esq.
BASHEIN & BASHEIN., CO., L.P.A.
Attorneys for Petitioners

Paul W. Flowers, Esq.
PAUL W. FLOWERS CO L.P.A.